Petition

81-2070
NO.

Office - Supreme Court, U.S.
FILED
MAY 7 1982
ALEXANDER L. STEVAS,
CLERK

IN THE
Supreme Court of the United States

OCTOBER TERM, 1981

JAMES LOFTEN, ROY HARRIS, ROBERT GOODWIN and PATRICIA GAINER,

Petitioners,

VS.

THE UNITED STATES OF AMERICA,

Respondent.

JOINT PETITION FOR CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

J. JEFFREY WEISENFELD
GOLDBERGER, FELDMAN,
DUBIN AND WEISENFELD
Attorneys for Petitioners
401 Broadway
New York, N.Y. 10013
(212) 431-9380

MARTIN G. WEINBERG
OTERI, WEINBERG AND LAWSON
75 Blossom Court
Boston, Massachusetts 02114
(617) 227-3700

Dick Bailey Printers 290 Richmond Avenue ■ Staten Island, New York 10302
TEL.: (212) 447-5358 — (516) 222-2470 — (914) 682-0848

QUESTIONS PRESENTED

1. Whether the court should grant the writ to clarify the extent to which probable cause to issue a wiretap order can be based upon unevaluated or conclusory information passed along to the issuing court as fact?

2. Whether the court should grant the writ to preserve the remaining vitality of the wiretap statutes requirement that normal investigative techniques be exhausted?

3. Whether the court should grant the writ so that it can exercise its supervisory powers to suppress the fruits of a wiretap order based upon misrepresentations, inaccuracies, and rumor and speculation presented as fact?

4. Can the failure of counsel to request appropriate instructions regarding the essential elements of the offenses charged and the statute of limitations defense waive all appellate review, including that mandated by the "plain error" rule?

5. Can the failure of counsel to request an appropriate statute of limitations instruction and instructions requiring a jury to consider the essential elements of an offense constitute a waiver of this defense absent any degree of an informed and intentional waiver by the defendant himself?

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IN THE
SUPREME COURT OF THE UNITED STATES

JAMES LOFTEN, ROY HARRIS, ROBERT GOODWIN and PATRICIA GAINER,

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JOINT PETITION FOR CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

OPINIONS BELOW

The opinion of the United States Court of Appeals for the Second Circuit affirming petitioners' convictions is set forth in the Appendix at Appendix C. The opinion of the District Court, (Goettel, J.) denying various pre-trial motions is set forth in the Appendix at Appendix B.

JURISDICTION

The judgment of the Court of Appeals for the Second Circuit was entered on March 8, 1982. This petition is timely filed. This Court's jurisdiction is invoked under 28 U.S.C. §1254(1).

CONSTITUTIONAL AND STATUTES INVOLVED[1]

This case involved the Fourth Amendment; the due process clause of the Fifth Amendment; and 18 U.S.C. §2515 et seq.

1. The text of these provisions are set out in the Appendix as Appendix E.

PROCEDURAL HISTORY

James Loften, Roy Harris, Patricia Haversham[2] and Robert Goodwin, the petitioners herein, were convicted of various crimes after a jury trial (Goettel, J.).

On March 8, 1982, the Second Circuit affirmed the convictions.

Indictment S 80 Cr. 729 was filed on February 5, 1981[3], in ten counts. Count One charged Loften, Harris, Morgan, Chin, Gainer, Starr, Goodwin, Viola Linkhorn, James Jones, and Lee Steward with conspiracy to distribute and possess with intent to distribute massive quantities of heroin and cocaine, in violation of Title 21, United States Code, Section 846. Count Two charged Loften alone with organizing a continuing criminal enterprise, in violation of Title 21, United States Code, Section 848, and sought the criminal forfeiture of six items of real estate, one store, nineteen automobiles, jewelry and various securities. Counts Three through Eight charged a number of defendants, including the seven present appellants, with distribution and possession with intent to distribute of large quantities of heroin, in violation of Title 21, United States Code, Section 841(a)(1). Count Nine charged Loften, Harris, Jones and an attorney, Albert H. Socolov, with conspiring to violate the federal anti-racketeering laws in violation of Title 18, United States Code, Section 1962(d). Count Ten charged Loften alone with evading payment of a total of $45,326 in income taxes for the years 1978 and 1979, in violation of Title 26, United States Code, Section 7201.

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2. Tried under the name Patricia Gainer.

3. The original indictment, filed on November 10, 1980, alleged a conspiracy commencing "on or about August 1, 1980." The instant (superceding) indictment addressed itself to a period of alleged criminal activity commencing "on or about November 21, 1966" and continuing to February 6, 1981.

After extensive pre-trial motions and hearings, trial began on June 9, 1981, and ended on August 2, 1981, when the jury returned a verdict convicting all defendants except Socolov. All of the present petitioners were convicted on Count One, the narcotics conspiracy charge. Loften was also convicted on Count Two, the continuing criminal enterprise count. All defendants named in Counts Three through Seven, substantive narcotics counts, were acquitted. Loften, Harris, Gainer, and Goodwin were convicted on Count Eight, another substantive narcotics count. Loften and Harris were convicted of the Count Nine racketeering conspiracy. Finally, Loften was convicted of Count Ten, the tax evasion charge.

On September 11, 1981, the Court sentenced Loften to a total of 25 years in prison and fines totalling $160,000. Judgment was also entered forfeiting various properties of Loften. Harris received a total of 12 years in prison; Morgan, 14 years in prison and fines totalling $50,000. On September 14, 1981, Goodwin was sentenced to a total of five years' imprisonment. On September 25, 1981, Gainer was sentenced to a total of 9 years in prison and fines of $50,000.

STATEMENT OF THE CASE

The government's proof at trial fell into three basic time periods: 1966-1975; 1975-1980; and 1980.

The government's evidence showed that from 1969-1975 Loften was involved in the sale and distribution of heroin. The main source of this evidence, Anne Reynolds, who worked for Loften, was arrested in 1976. Thus, for the period 1976 to 1980, when further evidence was obtained through wiretaps of Loften's supplier, Anthony Todisco, there was very little, if any direct evidence that Loften and his associates continued in the narcotics trade.

In 1980, the government during its investigation and wiretapping of Todisco, obtained evidence that Loften had been purchasing narcotics from Todisco. On September 3, 1980, Todisco was arrested. On September 19, 1980 the government obtained a wiretap order for Loften's two home phones. This wiretap order was extended until October 31, 1980, when Loften was arrested. Approximately 2400 conversations were intercepted and these conversations formed the heart of the government's case against petitioners.

Given the state of evidence—one cluster relating to drug activities in 1969-1975, and the other to 1980—the trial judge was plainly required to instruct the jury that it could not convict the petitioner of Count I on the bases of criminal activity between 1969 and 1975 unless it found beyond a reasonable doubt that this criminal activity was part of a conspiracy which extended into the limitations period. No such instruction was requested by petitioner's counsel. Nonetheless, the trial court did not give *any* instruction which in any way referred to the statute of limitations and, accordingly, the jury's attention was not focused on this issue. In fact, the given instructions affirmatively informed the jury that it could convict exclusively on the basis of the 1969-1975 acts. The court charged:

> "In this case, the defendants are charged with conspiracy to violate federal drug laws by scheming to distribute and possessing the intent to distribute a Schedule I controlled substance, that is, heroin, and a Schedule II controlled substance cocaine. The cocaine transactions you will recall are alleged to have occurred some years ago. In order to find the defendants guilty of the conspiracy charge in Court I, you must find that at least one of the two violations of the federal drug laws I just mentioned was an objective of the conspiracy. That is, it is sufficient if you find that an objective of the conspiracy was either to distribute or to possess with intent to distribute either heroin or cocaine."

The only evidence of criminal activity involving cocaine related to the 1969-1975 period. In fact, the District Court stated to the jury "the cocaine transactions you will recall are alleged to have occurred some years ago." This instruction was combined with one stating that it was sufficient for a jury to find that an objective of the conspiracy was "to distribute . . . cocaine. These combined instructions constituted authority for the jury to convict petitioners solely on the basis of acts which occurred in the 1969-1975 period, without any finding that the 1969-1975 conspiracy extended into the "limitations period".

Compounding matters, the trial court further instructed:

> "The period of time charged in the indictment runs from on or about November 21, 1966[4] to on or about February 6, 1981, and it is not necessary for the government to prove that the conspiracy started and ended on those specific dates. It is sufficient if you find that in fact the conspiracy was formed and that it existed for some substantial time *within the period set forth in the indictment* and that at least one overt act was committed in furtherance of the conspiracy during that period." (Emphasis supplied).

This instruction, in effect, constituted an explicit mandate for the jury to convict solely on the basis of a 1969-1975 conspiracy—which "existed for some substantial time within the periods set forth in the indictment"—without regard to whether that conspiracy extended into the limitations period.

In addition, the trial Judge instructed the jury as follows:

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4. The 1966 overt acts were limited to Count II; the 1969-1975 overt acts were applicable to Counts I, II and IX.

> "A conspiracy, once formed, is presumed to continue until there is an affirmative act of termination by its members, or it is otherwise terminated as, for example, by arrest of the conspirator."

In giving this instruction, the judge did not tell the jury that it had *a choice,* or that it *might infer* the conclusion that the conspiracy continued. Nor did the judge state that the presumption of indefinite continuance could be rebutted, or that the strength of the presumption varied with time and depended on the surrounding circumstances. Instead, the judge instructed flatly, and without qualification, that continuance of a conspiracy *"is presumed"*. Consequently, the jury "could well have interpreted the presumption as *'conclusive'*, that is, not technically as a presumption at all, but rather as an irrebuttable direction by the court to find", *Sandstrom v. Montana,* 442 U.S. 510, 517 (1979), that the 1969-1975 conspiracy continued into and merged with the 1980 conspiracy notwithstanding the five-year gap in evidence between them. Alternatively, the jury may have interpreted the instruction as a direction to find a single, overall conspiracy unless the defendants affirmatively proved the contrary—"thus effectively shifting the burden of persuasion" on an essential element of the government's case; but again, no objection was made thereto, nor was an alternative instruction requested.

Like the conspiracy charged by Count I, the crimes charged by Counts II and IX[5] were alleged to extend back in time from the date of the filing of the indictment for far more than five years. Both Counts II and IX were subject to the same five-year statute of limitations applicable to Count I. Yet, the trial court failed to instruct the jury that it could not convict the petitioner on Counts II and IX, ex-

5. As a result of a *Pinkerton* instruction those petitioners convicted on Count VIII are eligible for relief under this Court's holding in *Stromberg v. California,* should Count I be reversed.

clusively, on the basis of criminal activities lying outside the limitations period. Indeed, rather than protect against convictions on these counts for pre-limitations acts, certain aspects of the jugde's instructions practically assured just such a result would occur.

In instructing on Count II, the continuing criminal enterprise charge, the trial judge stated:

> "The first element of the charge that the Government must prove is that Loften engaged in an enterprise to violate the federal drug laws. This element is satisfied if you find that Loften is guilty of the crime of conspiracy charged in Count I, the elements of which I have already discussed. In other words, *in order to convict under Count II you must first find that Loften knowingly and wilfully engaged in and participated in the conspiracy to violate the drug laws relating to the distribution or possession with intent to distribute heroin or cocaine.*" (Emphasis supplied).

Thus, the jury, having been invited, if not required to convict the petitioner of Count I solely on the basis of acts occurring beyond the five year limitation period, were similarly instructed to predicate a conviction on Count II upon a complete disregard of the statute of limitations requirement.

With regard to Count IX, the trial court charged the jury that it was not necessary for the government to prove that the racketeering conspiracy started and ended on the precise dates alleged in the indictment; that it was sufficient to prove that the conspiracy existed *at some time within that period.* This further legitimized a conviction based upon acts wholly outside the limitations period, especially since the testimony regarding illegal acts in the pre-limitations period was more direct and immediate than the testimony regarding the five-month period in 1980.

Nor was the statute of limitations omission the only instruction error complained of upon direct appeal. For

example, in his entire instruction on Count II, the trial judge made only one reference to the number of violations which must be proved in order to convict under Section 843—and that was when he instructed that the government was required to prove only that petitioner's conduct "in committing *one or more* of these offenses" was part of a continuing series of violations. Thus, the jury was charged that proof of a "series" of violations, within the meaning of a §848 continuing criminal enterprise could consist of two illegal acts—in direct contravention of unequivocal case law proscribing that a minimum of three alleged acts be proved. No evidence reflects any personal waiver by any petitioner as to this issue.

Petitioners' counsel neither requested a statute of limitations instruction or objected to those portions of the charge pertaining to counts I, II and IX, hereinabove referred to. It was upon these grounds that the Court below deemed these alleged errors to have been waived, even to the extent of precluding an appellate review to determine the existence of plain error.

INTRODUCTORY STATEMENT

This case requires Supreme Court review. The first three issues raised relate to the legality of a wiretap order. The papers filed in support of the wiretap application were characterized by the district court as having a number of deficiencies and inaccuracies, particularly in the list of so-called documented narcotics traffickers (B4). In fact, this list of documented narcotics traffickers, which was entered by the agents as the key link between information some five years old and present probable cause, was further discredited by the District Court as "a very poorly executed project . . ." (B4), containing ". . . numerous inaccuracies and errors . . ." (B4)

As to the supportive papers generally, the District

Court pointed out that the agents and the agency, the DEA, persistently used ". . . large amounts of unevaluated intelligence information without disclosing to the Court that the information is often no more than rumor." (B5). The District Court's termed the agents' efforts as a "bad show" (B5). The Second Circuit characterized it as "slipshod" (C3).

While it is true that the government requested that the list of traffickers not be relied upon by the Court in evaluating probable cause, and that the Courts below found that the numerous errors and inaccuracies in the supporting papers were not the result of improper motive, nor intentional, any fair reading of the record indicates that, at least in significant part the agents did intentionally misrepresent the facts and did so in order to revive stale information and create current probable cause.

The opinion of the Second Circuit attempted to confine the errors and inaccuracies to the excised list, but analysis of the supporting papers does not lend itself to such surgical precision.

In any event, the supporting papers do not establish probable cause. Even if they did, this Court should exercise its supervisory powers and deny the government the fruits of such an effort.

Further, the wiretap applications in this case are completely devoid of meaningful allegations that normal investigative procedures were unlikely to succeed. In fact, this statutory requirement was made a mockery in this case, for all that the agents did was to file virtually the same boiler plate affidavit filed in a previous related case.

There is an understandable reluctance on the part of the judiciary to suppress probative evidence, especially, where, as here, narcotics are involved. However, the method of obtaining the wiretap in the case simply cannot be countenanced.

The fourth and fifth issues raised concern petitioner's

right to be judged by triers of fact guided by and relying for their decisions on just, accurate, unambiguous and complete instructions of law accorded them by the trial court is a cornerstone principle of our system of administering criminal justice. The superceding indictment itself, alleging a cluster of five overt acts (as to Count One, the conspiracy and implicitly, Count Two, the continuing criminal enterprise) and five acts constituting a pattern of racketeering (as to Count Nine, the allegation of a violation of 18 U.S.C. §1962(a),) between *1966 and 1975,* contained the ingredients for conviction *without any need for reference* to a second cluster of acts although only the 1980 acts were within the statute of limitations. Unless the triers of fact accepted the Government's proof of guilt beyond a reasonable doubt as to at least *one* 1980 transaction which fulfilled the requirements of 21 U.S.C. §846 (Count One), 21 U.S.C. §848 (Count Two) or 18 U.S.C. §1962(a) (Count Nine), *the statute of limitations barred condemnation of any trial defendant.*

Nonetheless, the jury *never* received an instruction requiring that they believe that the crimes alleged to begin in 1966 or 1969 continued within the limitations period. The jury *never* were instructed on the criteria for intelligently determining whether or not the 1966-1975 cluster of acts were interdependent with and thus an integral part of the single conspiracy alleged in Count One. The jury, instead, were instructed that "a conspiracy, once formed, is presumed to continue . . ." absent affirmative evidence its goals were achieved or its participants arrested, a mandatory presumption, or at a minimum, on these facts, one lacking the Due Process requisite that the proven fact (criminal conduct in 1975) is more likely than not to cause the presumed fact (continuation of criminal conduct in 1980). Finally, as to Lotten, the 21 U.S.C. §848 charge is fatally infirm, containing no definition of "a series" and other misstatements as to the essential elements of that

statute with its unique no parole 10-year to life imprisonment punishment.

Petitioner's counsel made no request for specific instructions regarding the statute of limitations, the criteria for multiple conspiracy, or regarding the elements of 21 U.S.C. §848; no objections were taken to either the omissions, the erroneous instructions, or to the unconstitutional presumption of continuity.[6] The court below, however, never subjected the instructions to *any* review at all, thus disregarding the command of the plain error rule, Federal Rule of Criminal Procedure 52(b). Absent any evidence of any waiver by the petitioner himself, the trial court's instructions and the absence of meaningful appellate review despite his counsel's omissions, require a redefinition of the relationship between fundamental rights waived, if at all, only by voluntary and intelligent client decisions, primary sua sponte judicial responsibilities to guide and instruct juries independent of the acuity of advocates to perceive and perfect the constitutional issues underlying their client's rights.

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6. The likelihood of the nexus of proven and presumed fact must be determined on a case by case basis. *Ulster County Court v. Allen*, 442 U.S. 2213 (1979).

REASONS FOR GRANTING THE WRIT

POINT I

THIS COURT SHOULD GRANT THE WRIT IN ORDER TO CLARIFY THE EXTENT TO WHICH PROBABLE CAUSE CAN BE BASED UPON UNEVALUATED OR CONCLUSORY INFORMATION PASSED ALONG TO THE COURT AS FACT.

As previously noted, the District Court stated that:

> More troublesome is the agent's (and indeed, the agency's) persistent use of large amounts of unevaluated intelligence information without disclosing to the Court that the information is often no more than rumor.

The asserted probable cause in the case can be summarized as follows:

1. The testimony of two witnesses (Reynolds and Brown) at a trial conducted at least four years prior to the application.
2. Lofton's background.
3. Lofton's telephone conversations with his supplier, Todisco, prior to Todisco's arrest on September 3, 1980.
4. Lofton's frequent use of the telephone.

a. The testimony of the two witnesses at the Moten trial

Agent Corcoran cited the testimony of two cooperating defendants in *United States v. Moten* to the effect that Loften had engaged in drug activities during the period of 1969 to 1976.

Agent Corcoran's description of material portions of this testimony was blatantly misleading. Moreover, the

distortions were such that they were clearly done intentionally to mislead Judge Carter into believing that this testimony was more supportive of the wiretap application than it actually was. Thus, Corcoran alleged:

> . . . John T. Brown, testified that, as part of the LOFTEN organization, he had sold approximately 5 kilograms of cocaine during the period December 1972 to approximately February, 1973.
>
> (App. D, pg. D11)

Thus, Corcoran used this allegation to convince Judge Carter that Brown had testified that Loften was operating a drug organization in 1972-3 and that John Brown had a reliable basis for making that allegation because he had been employed by that organization and had sole five kilograms of cocaine for that organization while he was so employed.

This description in no way comported with Brown's actual testimony. Contrary to being employed by, or selling drugs for, any organization, Brown testified only that he sold drugs *to* someone named Lois who said that she had been told that the drugs were for someone else named "Jimmie." Moreover, Brown testified that "Jimmie's" last name was Lawson:

> Q: At any time prior to your cooperation with the Federal Government, did you learn the last name of the man named Jimmy?
> A: Yes.
> Q: What is his last name?
> A: Lawson.
>
> (transcript at 1336)

The Manhattan telephone directory alone lists two persons by that name. For Agent Corcoran to lead Judge Carter into believing that Brown had testified that he had been

employed by, and sold drugs for, an organization headed by Loften, was thus highly misleading. Indeed, it is questionable, given the misrepresentations which occurred, that Corcoran ever even read the transcripts at all. Even a cursory review of that testimony would have revealed that his allegations concerning Brown were not correct. To forgo such review and instead present false information to a federal judge, swearing that it was confirmed by trial testimony, was clearly reckless.

The other *Moten* witness, Ann Reynolds, did make incriminating allegations concerning Loften. However, Corcoran's affidavit failed to demonstrate sufficient indicia of reliability concerning Reynolds (or Brown) to allow Judge Carter to rely on their allegation for any purpose. In fact, the government itself apparently did not regard these witnesses' allegations to be sufficient to establish probable cause as to Loften, since he was not indicted in that case. Moreover, there was no claim in Corcoran's affidavit that the testimony of these particular witnesses even produced any convictions in *Moten* or any other case, or that the agents possessed sufficient information to establish that these confessed criminals satisfied the "established reliability" prong of the *Aguilar-Spinelli* test. To the contrary, these were cooperating defendants, testifying on behalf of the prosecution in order to ingratiate themselves with the government and extricate themselves from their own legal dilemmas. As such, any gratuitous asides which they dropped about a non-defendant in that case must be regarded with extreme suspicion. Finally, even if they had been shown to be reliable, these allegations were over four years stale, consequently, they could not properly contribute anything to the determination of current probable cause.

b. The 1975 New York Times article

Agent Corcoran cited, as weighty authority, a 1975 New York Times article which claimed that appellant

Loften was a major drug dealer. Lacking any pretense of satisfying either prong of the Aguillar-Spinelli test and being at least five years stale, the agent's reliance on this article constituted a new low in probable cause allegations. Moreover, Corcoran admitted that he never did anything to check out any of the allegations in that article (H502-4)[7] and did not even know who had written it (H502). Even on its face the article contained glaring errors as to Loften's arrest record which were contradicted by Corcoran himself when he described Loften's record in the very next paragraph of his affidavit. Corcoran made no effort, however, to point out these contradictions to Judge Carter. Given the false and/or unsubstantiated allegations in this anonymous article, it was entitled to no consideration whatsoever. Nevertheless, Judge Goettel cited it as one of the allegations in Corcoran's affidavit which contributed to the court's finding of probable cause.

c. Loften's sources of income

Agent Corcoran alleged that Loften is a part-owner of a hardware store and that his wife operates a boutique (App. D, p. D12). Contrary to contributing to probable cause, these allegations established that Loften had legitimate sources for his income.

d. Loften's prior record

Corcoran's allegation about Loften's 1960's arrests (App. D, p. D12) contributed nothing to probable cause, both because Corcoran never alleged that any of those arrests led to convictions and because the alleged arrests were over 14 years stale. Corcoran's reliance on Loften's 1975 income tax charge was likewise invalid since that charge provided no proof whatsoever that Loften was engaged in any sort of drug activity.

7. References to the minutes of the hearing on the motion to suppress are designated "H".

e. Loften's conversations with Todisco

Corcoran's affidavit (App. D, p. D17 etc.) described certain conversations between Loften and Todisco during the eleven day period from August 7, 1980 to August 18, 1980 which were intercepted over a wiretap on defendant Todisco's phone.

Since no drugs were mentioned in any of the conversations in question, Corcoran was forced to allege that innocuous words such as "trucks", "trailers", "cheese" and "chalk" were actually code words for narcotics. Corcoran nowhere claimed, however, that he or any other agent had ever heard any of these words used as a euphemism for drugs in any other narcotics investigation.

Moreover, Corcoran's claim that the references to "trucks" were references to heroin was also contradicted by the fact that Todisco stated in the August 18, 1980 conversation that the "trucks just keep coming in", which Corcoran interpreted as a comment on Todisco's supply of heroin. The Todisco investigation established, however, that Todisco was not receiving any heroin during this period, causing an agreed-upon transaction to be postponed several times, finally taking place on September 3, 1980. It is therefore clear, that the "trucks" which just kept coming in on August 18 were not heroin.

Corcoran's failure to advise Judge Carter that his incriminating interpretation of the Todisco-Loften conversations was contradicted by these other facts in the Agent's possession was a material omission.

It must be remembered that Todisco, who regardless of any drug activities, also operated a legitimate trucking operation, and Loften, who had a legitimate need for trucks in connection with his various business activities, were actually discussing exactly what they said they were discussing—trucks.

Similarly, Agent Corcoran's eagerness to interpret either "chalk" or "cheese" as coded references to drugs is totally unsubstantiated. There was no claim that

these terms are commonly used to denote drugs. To the contrary, it is now clear that "cheese" was not a reference to drugs at all, but rather a nickname for a person (see First Five Day Report for the October 10, 1980 surveillance, dated October 16, 1980 at 9; Second Five Day Report for the October 10, 1980 surveillance, dated October 20, 1980 at 6). In all likelihood, the August 8, 1980 conversation would have made that fact clear, if the Agents had been honest in their description of it.

Even if these conversations are interpreted as culpable, those discussions, as well as the possibility of any transactions between Loften and Todisco, ended with the last conversation on August 18, 1980, or at the latest, when Todisco was arrested and incarcerated on September 3, 1980. Thereafter, before the Agents could properly seek authorization to tap Loften's phones, it was imperative for them to establish that any suspicions as to Loften continued to have vitality, despite the arrest of his only alleged supplier.

Corcoran relied on his list of twelve "documented narcotics traffickers" to prove that fact. Since that list was completely false, however, the Corcoran affidavit lacked any truthful proof of current probable cause, and was therefore insufficient to sustain the wiretap authorization.

The false statements and unsubstantiated allegations in the Corcoran affidavit, particularly in the list of twelve "documented narcotics traffickers, were essential to the wiretap application. Stripped of those misrepresentations, the affidavit failed to establish that Loften was dealing in drugs, particularly after the arrest of his only suspected supplier. The district court could not properly compensate for this deficiency in proof with unsubstantiated speculation that Loften "probably" had other sources or would seek out new ones. Since the false information was essential to probable cause, the wiretap evidence should have been suppressed.

POINT II

THIS COURT SHOULD GRANT THE WRIT IN ORDER TO ARREST THE COMPLETE EMASCULATION OF THE REQUIREMENT OF EXHAUSTION OF NORMAL INVESTIGATIVE TECHNIQUES.

Unbeknownst to Judge Carter when he was evaluating the wiretap application in this case, the paragraphs of the Corcoran affidavit going to exhaustion of normal investigative procedures were quoted virtually verbatim from an affidavit which this same agent had previously submitted in support of an application to tap someone else's phones—those belonging to Anthony Todisco. By merely substituting Loften's name wherever Todisco's name had appeared in the earlier affidavit, Corcoran attributed all of the characteristics to Loften which he had earlier attributed to Todisco.

The DEA conducted no investigation before applying to Judge Carter for wiretap authorization. Rather, Agent Corcoran admitted that the decision to apply for a wiretap on Loften's phones was made as soon as the agents overheard the Loften-Todisco conversation of August 18, 1980 over the Todisco tap (H340, 395, 403). The DEA did not even open a folder on Mr. Loften until mid-September, immediately before they applied for the Loften wiretap (H423). No DEA agent was assigned to surveil Mr. Loften (H397, 411, 430) and virtually no effort was made to locate an informant (H529). Even the Westchester investigation had been limited. Except for putting in the pen register at the request of the DEA and conducting some "intermittant surveillance", they had done very little with regard to this individual. When Corcoran was questioned concerning what he had learned from Westchester police about Loften, he was able to list

only the pen register (H495-6), Loften's address and the fact that the Westchester police

> . . . knew him to be a pretty, you know, high type dealer, very well off, no substantial means of income. Basically that's about it, your Honor. (H500-01)

Consequently, the district court was obliged to concede that "Corcoran's testimony did not support his affidavit claim concerning substantial efforts being made to locate a confidential informant who could provide entrance into the Loften organization" and that Corcoran also had "little personal knowledge about attempts to conduct surveillance of Loften."

The application in this case fails to set forth any factual basis for the required determination of need. Congress required an "adequate factual history of the investigation and a description of the criminal enterprise sufficient to enable the district judge to determine independently of an agent's assertions with respect to his or her agents' experience, that ordinary investigative techniques very likely will not succeed . . ." *United States v. Spagnuolo,* 549 F.2d 705 (9th Cir. 1977). Therefore, more than mere boilerplate assertions are required. Facts are necessary to enable the district judge to make his own determination of need. The use of identical affidavits to indicate need in separate investigations manifests an attitude on the part of the government towards the wiretap statute which can best be characterized as extraordinarily cavalier.

By relying on boilerplate, the government failed to meet the requirements of the law. Consequently, the wiretap evidence should have been suppressed.

POINT III

THIS COURT SHOULD GRANT THE WRIT SO THAT IN THE EXERCISE OF ITS SUPERVISORY POWERS IT CAN SUPPRESS THE WIRETAP EVIDENCE.

In attempting to create current probable cause, *Sgro v. United States,* 287 U.S. 206 (1932), after the arrest of Todisco terminated whatever relationship existed, Corcoran attempted to show that Loften was currently using his phones to commit drug crimes. By advising the Judge that from the calls recorded by the pen register on Loften's phone, the DEA had compiled a list of 12 "documented narcotics traffickers" whom Loften had supposedly called after September 3, 1980.

During the proceedings below, the government conceded and the district court found (B4) that most of the people on this list had not even been phoned by Loften after September 3, 1980. The government also conceded and the district court found that there were a large number of false statements in the allegations concerning the people on this list (B4).

In fact, every single entry on this list was false. Individuals described as documented "major" narcotics dealers with "numerous" narcotics arrests or convictions were in fact persons with New York City Police or federal governmental security clearance and no arrests or convictions of any type. Some of the "documented narcotics dealers" were not even the subscribers or users of the numbers attributed to them. In short, the list can only be characterized as a total fraud.

It was established that certain of the allegations in Corcoran's affidavit, particularly in the section pertaining to the exhaustion of normal investigative procedures (App. D, pp. D26-D28), were known to be false or un-

substantiated at the time they were made.

Corcoran was likewise intentionally incorrect when he alleged that "attempts to follow Loften have been unsuccessful because Loften takes affirmative steps to detect any possible surveillance (e.g. frequently varying driving speeds and running stop signs." (App. D, p. D26). This allegation, lifted verbatim by Corcoran from his earlier allegations about Todisco in the *Todisco* wiretap application, had no basis in fact as to Loften; the DEA had never attempted to follow Loften (H392, 397, 411) and Westchester police had never informed Corcoran as to whether their surveillance of Loften had revealed any such practice (H495-6, 500-01).

Corcoran's allegations that John Brown had testified in the *Moten* trial that he had sold drugs for Loften was likewise knowingly false. There was no testimony to that effct anywhere in the *Moten* transcript (H515). In fact, Corcoran didn't even know who drafted this paragraph of his affidavit (H506).

Likewise, Corcoran's citation of the 1975 New York Times article as a reliable source of incriminating information against Mr. Loften was dishonest; Corcoran's own affidavit establishes that this article was incorrect even as to something as fundamental as Mr. Loften's arrest record (H503).

Perhaps the most serious deliberate misstatement, however, was the repeated use of the term "documented narcotics traffickers" to bolster the allegations of Corcoran's affidavit.

In addition to these deliberate misstatements, the multitude of other misrepresentations and exaggerations which pervaded the Corcoran affidavit clearly established that the agents and prosecutor who prepared it did so with reckless disregard of the truth. *Franks v. Delaware,* 438 U.S. 154 (1978). Using self-induced exigencies as an excuse, these individuals chose to rely for their probable

cause allegations in large part on unevaluated intelligence information from the DEA intelligence section, despite the fact that they knew full well from past experience that information from this source was frequently unreliable (H103-4, 233, 237, 465).

The false statements in Corcoran's affidavit were not only material but central to any finding of current probable cause. Even if they had been immaterial, however, their magnitude and blatancy would require suppression under this Court's duty to insure the proper administration of justice.

Such a remedy would be particularly appropriate in a case where, if probable cause was shown at all in the absence of the false statements, it was borderline at best. It is in precisely that circumstance that the temptation would be greatest for the agents to embellish their questionable showing with allegations which were deliberately or recklessly false. So long as the agents may safely assume that they can salvage a warrant application by merely redacting the false statements from it, if discovered, they will be strongly motivated to bolster weak arguments in such applications with reckless or false allegations. If, in the final analysis, the determination of probable cause is always made to turn on the remainder of the affidavit, the agents have nothing to lose, and much to gain, by engaging in such deceptions. Consequently, it is in that circumstance that the deterrant effect of the exclusionary rule would most effectively be served by suppression.

The misconduct by the DEA in this case was unconscionable. This was not a case of one or two isolated misstatements in an affidavit otherwise replete with probable cause. Rather, it was a case of rempant falsity, consuming whole sections of the wiretap application. Stripped of these false statements, the application is left with little more than one ambiguous conversation and a number of inflammatory but unsubstantiated rumors.

Moreover, according to the agents who testified at the hearing, this is not the first case in which they have presented unevaluated information from the DEA Intelligence section as documented proof in wiretap applications. To the contrary, Agent Sandler testified that he himself knew of at least ten cases, two in the Southern District, in which such "raw" data was used without any attempt having been made to check out its sources (H351-2).

This court should grant the writ in order to exercise its supervisory powers to suppress the wiretap evidence in this case. See, *McNabb v. United States,* 318 U.S. 332 (1943); *Elkins v. United States,* 364 U.S. 206 (1960).

POINT IV

THE DECISION BELOW RAISES THE ISSUE OF WHETHER THE FAILURE OF COUNSEL TO REQUEST AN APPROPRIATE INSTRUCTION WAIVES NOT ONLY PLAIN ERROR BUT ALL APPELLATE REVIEW TO DETERMINE THE EXISTENCE OF CONSTITUTIONAL OR PREJUDICIAL ERROR.

"Plain error" exists when it is highly probable that the error materially affected the verdict. *United States v. Dixon,* 562 F.2d 1138 (9th Cir. 1977). The relevant inquiry is what effect the error had or reasonably may be taken to have had on the jury's decision. *United States v. Shepherd,* 576 F.2d 719 (7th Cir. 1978). The effect of the error on the jury's verdict requires specific definition in each case. *United States v. Ong,* 541 F.2d 331 (2d Cir. 1976).

The failure of the trial judge to instruct on the statute of limitations defense constituted plain error. In like manner, the trial court's conspiracy instruction on the

presumption of continuity and its failure to define intelligence criteria for a jury determination of whether the proof showed multiple or a single conspiracy unconstitutionally shifted the burden of proof upon the petitioner. Said instructions were susceptible to being interpreted as *irrebuttable* directions to find that a single conspiracy continued from the first cluster of acts into the second i.e. 1980 cluster. Given such an interpretation, the jury would never have reached the question of which party has the burden of proof on the issue or the statute of limitations issue because the jury would have believed that there was no issue to resolve.

While there are cases which state that a conspirator has the burden of proving his withdrawal from an ongoing conspiracy (but see *United States v. Read,* 658 F.2d 1225 (7th Cir. 1981)), it is clear that the *burden of proving continuation of the conspiracy as a whole* must remain on the government. *United States v. Russano,* 257 F.2d 712 (2d Cir. 1958).

The need for the burden of proving continuance to remain on the government is particularly compelling where, as here, the statute of limitations is of critical importance. Thus, in discussing a limitation issue in *Grunewald v. United States,* 353 U.S. 391, 396 (1957), the Supreme Court stated:

> "It was therefore incumbent on the Government to prove that the conspiracy, as contemplated in the agreement as finally formulated, was still in existence [in the limitations period] . . .".

See also *United States v. Siebricht,* 59 F.2d 976 (2d Cir. 1932). So too here, it was "incumbent on the Government to prove" that the 1969-1975 conspiracy extended into the limitations period, and it was unconstitutional to relieve the Government of that responsibility by a presumption

which shifted the burden to the petitioner.

The burden of persuasion cannot be constitutionally imposed on the petitioner even on the issue of a single conspirator's withdrawal from an ongoing conspiracy. The cogent reasoning of the Court in *United States v. Read,* 658 F.2d 1225, 1231-1236 (7th Cir. 1981), which petitioner adopts and incorporates by reference, demonstrates that the cases ruling to the contrary, have been wrongly decided. Therefore, since the burden of persuasion may not be constitutionally imposed on the petitioner even on the issue of a single conspirator's withdrawal from an ongoing conspiracy, it may not be so imposed as to the issue of termination of the conspiracy as a whole, *a fortiori.*

In like manner, the petitioner complains of the trial court's instruction that "one or more" offenses is sufficient to establish a series of illegal acts constituting a "continuing criminal enterprise" under 21 U.S.C. §848. For it is well settled that a minimum of *three* illegal acts must be proved to establish a continuing criminal enterprise. *United States v. Johnson,* 575 F.2d 1347, 1357 (5th Cir. 1978); *United States v. Valenzuela,* 596 F.2d 1361, 1367 (9th Cir. 1979); *United States v. Fry,* 413 F.Supp. 1269, 1272 (E.D. Mich. 1977); aff'd 559 F.2d 1221 (6th Cir. 1977); *United States v. Collier,* 358 F.Supp. 1351 (E.D. Mich. 1973), aff'd 493 F.2d 327 (6th Cir. 1974), *cert. denied* 419 U.S. 831.

It should be noted that the petitioner's objection here is not only to the trial court's failure to instruct *at all* on the "three or more" offenses component of the series element, but to the instruction *actually given* which invited the jury to convict on the basis of one illegal act. This is *not* an instance where a trial court fails to instruct as to the meaning of a term which has no specific technical meaning and is written the common understanding of the jurors. See *United States v. Marino,* 639 F.2d 882 (2d Cir. 1981) (the term "manager" as used in 18 U.S.C. §660 held to re-

quire no special definition). The instant situation consists of a failure to inform the jury of the constitutional requirement that three or more substantive violations be proved as a pre-requisite to the establishment of a continuing criminal enterprise. Such a failure constitutes plain error.

It is a settled principle of law that a criminal defendant is entitled to have the jury instructed properly on all of the essential elements of the crime charged—and that a failure of the trial court to do so affects the defendant's "substantial rights", requiring reversal even when the error is not preserved at trial. See, e.g., *United States v. Alsondo,* 486 F.2d 1339, 1344 (2d Cir. 1973). ("Where there is a failure to charge an essential element of the offense, the error almost invariably affects 'substantial rights' within the meaning of the rule [i.e., Fed. R. Crim. P. 52(b)]"); *United States v. Howard,* 506 F.2d 1131, 1134 (2d Cir. 1974) ("Even if we believe that there was overwhelming proof of the elements not charged, we must still reverse."); *United States v. Clark,* 475 F.2d 240, 248-250 (2d Cir. 1973); *United States v. Fields,* 466 F.2d 119, 121 (2d Cir. 1972).

It is submitted that the failure to charge on the statute of limitations defense, as well as the incorrect instruction regarding the "continuing criminal enterprise"—both—constitute plain error. Accordingly, the failure of petitioner's counsel to request appropriate instructions should not be deemed to effectuate waiver.

However, the petitioner complains of a waiver twofold in nature, as reflected in the opinion of the court below. For not only were his claims deemed to have been waived, but also his right to an appellate determination of whether plain error had been occasioned was not provided.

Is there not some minimal threshhold consideration requirement to which an appellate tribunal must adhere in

order to determine the prima facie existence of plain error warranting a judicial resolve thereof? For not to look is the equivalent of not to see, and the standard of waiver utilized by the court below would forever obviate judicial correction of plain error.

The resolve of this issue is sufficiently important so as to warrant the review of this Honorable Court.

POINT V

THE DECISION BELOW CONFLICTS WITH THE DECISIONS OF OTHER COURTS OF APPEALS AND, INDEED, WITH OTHER SECOND CIRCUIT DECISIONS AS TO WHETHER THE STATUTE OF LIMITATIONS IS A "JURISDICTIONAL" LIMITATION UPON THE POWER TO PROSECUTE AND PUNISH WHICH CANNOT BE WAIVED, OR WHETHER ITS WAIVER MUST BE INFORMED, DELIBERATE AND INTENTIONAL.

The Court below refused to consider the failure of the trial judge to charge on the statute of limitations (undisputedly warranted by the evidence) on the ground that this issue had been waived by the failure of Petitioner's counsel to request an appropriate instruction, citing *United States v. Grammatikos,* 633 F.2d 1013 (2d Cir. 1980).[8]

Although it is true that the *Grammatikos* court states that:

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8. The applicable statute of limitations, 18 U.S.C. §282, was not tolled by the original indictment which focused on August, 1980 not 1966 as the start of the conspiracy.

> "Under these circumstances (where no explicit request for a statute of limitations instruction was made at trial), we have long and consistently held such issues to have been waived," 633 F.2d at 1022,

it is also—and equally—true that this statement was dictum, *since the court proceeded, in any event, to analyze this issue under a plain error standard.* Moreover, the Second Circuit has promulgated decision, neither modified nor overruled, which contain directly contrary statements.

In *United States v. Borelli,* 336 F.2d 376, 385-87 (2d Cir. 1964), cert. denied sub nom., *Cinquegrano v. United States,* 379 U.S. 960 (1965), the defendants' conspiracy convictions were reversed because the trial judge failed to instruct the jury adequately in the relationship between the single versus multiple conspiracies issue and the potential statute of limitations defense of each defendant. Invoking Rule 52(b), the Court reversed the convictions despite the fact that a pertinent exception to the trial judge's charge had not been taken. Indeed, the *Borelli* Court did not limit its holding to the facts before it. On the contrary, the Court expressly laid it down as a general principle to govern future cases that where the issue of single versus multiple conspiracies has "practical importance" because of the statute of limitations, the trial judge "must appropriately focus the jury's attention on that issue." *Id.,* at 386, n. 4. This mandate was in no way conditioned on the making of an appropriate request to charge.

In *United States v. Alfonso-Perez,* 535 F.2d 1362, 1364 (2d Cir. 1976), the defendant had submitted a request to charge on the limitations issue which was denied by the trial judge. This Court noted that while the government had objected to the proposed charge on the ground that it was "confusing as it was prepared", the defendant had indicated on the record that he was proposing the charge for

its substance. It is to be noted that the *Alphonso-Perez* Court stated:

> "Moreover, we have recognized that a statute of limitations charge must be given even though 'this may further complicate the already complex charge in a narcotics conspiracy trial.' *United States v. Borelli,* 336 F.2d [at] 386." 535 F.2d at 1364.

Even if a proper request is not made, a limitations instruction must still be given; there exists an unresolved conflict in the opposing *Borelli-Alfonso-Perez* and *Grammatikos* opinions on the issue of whether a failure to request a limitations instruction constitutes a waiver. There also exists the additional related issue as to whether the statute of limitations is a *jurisdictional* limitation upon the power to prosecute and punish which cannot be waived. It has been so held by the Sixth Circuit in *Benes v. United States,* 276 F.2d 99, 109 (6th Cir. 1960). Although the Second Circuit has declined to so hold, its recognition of a waiver of the statute of limitations has been under extremely narrow circumstances. It has been held, for example, that the limitations defense may be waived by a plea of guilty where the waiver is deliberate and intentional. *United States v. Parrino,* 212 F.2d 919, 922 (2d Cir. 1953), cert. denied 348 U.S. 840 (1964); *United States v. Doyle,* 348 F.2d 716, 718-719 (2d Cir. 1964), cert. denied 382 U.S. 843 (1965). The District of Colombia Circuit has sustained a written waiver of the limitations defense where the defendant's counsel "negotiated for the express written waiver, obviously intended that his client would derive some benefit from it" (i.e., the opportunity to engage in plea bargaining) and where the defendant expected the waiver "knowingly and wilfully after full consultation with his attorney." *United States v. Wild,* 551 F.2d 418, 423 (D.C. Cir. 1976), cert. denied 431 U.S. 916 (1977).

These cases, although holding the statute of limitations to be now jurisdictional, nevertheless establish that a

waiver of the statute cannot be found absent the clearest and most compelling proof that the waiver is informed and intentional. *No such proof exists in the instant case, nor was the issue of its presence examined by the court below.*

Thus, it remains yet to be resolved, whether the statute of limitations is jurisdictional; and if it is not, whether the mere failure of counsel to request an appropriate instruction—alone—constitutes a waiver of the limitations defense.

These conflicts justify the grant of certiorari to review the judgment below.

CONCLUSION

FOR THE REASONS STATED ABOVE THE WRIT SHOULD BE GRANTED.

Respectfully submitted,

J. JEFFREY WEISENFELD
GOLDBERGER, FELDMAN,
DUBIN AND WEISENFELD
Attorneys for Petitioner
401 Broadway
New York, N.Y. 10013
(212) 431-9380

MARTIN G. WEINBERG
OTERI, WEINBERG AND LAWSON
75 Blossom Court
Boston, Massachusetts 02114
(617) 227-3700

Appendix

APPENDIX A—INDICTMENT

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

UNITED STATES OF AMERICA,

v.

JAMES E. LOFTEN, a/k/a "Jimmie Haversham", a/k/ "J", ALBERT H. SOCOLOV, ROY HARRIS, a/k/a "The Big Fellow", HENRY MORGAN, JR., a/k/a "D", a/k/a "Don", JAMES JONES, a/k/a "Crooks", a/k/a "Stein", a/k/a "Stizein," PAUL CHIN, a/k/a "Paul Lee", a/k/a "P", a/k/a "Pizaul", a/k/a Chizin", PATRICIA E. GAINER, a/k/a "Elizabeth B. Haversham", a/k/a "Patricia E. Haversham," a/k/a "Edna Hanson", a/k/a "Brandi Haversham", FURMAN STARR, a/k/a "Bimbo", a/k/a "Bo", a/k/a "Bizzo,", a/k/a one of "the Kids", ROBERT GOODWIN, a/k/a "Robert Summers", a/k/a "Rizob", a/k/a one of "the Kids", VIOLA LINKHORN, and LEE STEWART, a/k/a "Benny",

Defendants.

INDICTMENT
S 80 Cr. 729 (GLG)

COUNT ONE
Conspiracy Count

The Grand Jury charges:

1. From on or about November 21, 1966 and continuously thereafter up to and including the date of the filing of this indictment, in the Southern District of New

York and elsewhere, the defendants, JAMES E. LOFTEN, a/k/a "Jimmie Haversham," a/k/a "J", ROY HARRIS, a/k/a "The Big Fellow," HENRY MORGAN, JR., a/k/a "D", "Don", PAUL CHIN, a/k/a "Paul Lee", a/k/a "P", a/k/a "Pizaul," a/k/a "Chizin", PATRICIA E. GAINER, a/k/a "Elizabeth B. Harversham," a/k/a "Patricia E. Haversham," a/k/a "Brandi Haversham," a/k/a "Edna Hanson," JAMES JONES, a/k/a "Crooks", a/k/a "Stein," a/k/a "Stizein," FURMAN STARR, a/k/a "Bimbo", a/k/a "Bo", a/k/a "Bizzo", a/k/a one of "the Kids," ROBERT GOODWIN, a/k/a "Robert Summers", a/k/a "Rizob", a/k/a one of "the Kids", VIOLA LINKHORN and LEE STEWART, a/k/a "Benny", together with anthony Todisco, a/k/a "Lefty," and his organization collectively referred to as "The Spaghettis" named herein as co-conspirators but not as defendants, and others to the Grand Jury known and unknown, unlawfully, wilfully and knowingly, combined, conspired, confederated and agreed, together and with each other, to violate the narcotics laws of the United States, specifically, Sections 812, 841(a)(1) and 841(b)(1)(A) of Title 21, United States Code.

THE OBJECTS OF THE CONSPIRACY

2. It was part of the conspiracy that the defendants and their co-conspirators, unlawfully, wilfully, intentionally and knowingly, would and did distribute and possess with intent to distribute massive amounts of heroin, a Schedule I narcotic drug controlled substance and cocaine, a Schedule II narcotic drug controlled substance, in violation of Sections 812, 841(a)(1) and 841(b)(1)(A) of Title 21, United States Code.

THE MEANS USED BY THE DEFENDANTS AND THEIR CO-CONSPIRATORS TO FURTHER THE OBJECTS OF THE CONSPIRACY

3. Among the means whereby the defendants and their co-conspirators would and did carry out the objects of the conspiracy and insure the success of their venture to receive and distribute narcotic drugs for profit were the following:

The conspiracy took the form of a loosely-knit business organization with members performing different functions and operating at different levels of responsibility.

(i) The head of the organization was JAMES E. LOFTEN, the defendant, who, along with this principal lieutenants, ROY HARRIS, HENRY MORGAN, JR., JAMES JONES and PATRICIA E. GAINER, the defendants, organized, supervised and managed the narcotics supply and distribution and other related activities of his narcotics organization in New York, Detroit and elsewhere.

(ii) Other members of the conspiracy, including PAUL CHIN, the defendant, and Anthony Todisco, supplied wholesale quantities of narcotic drugs to LOFTEN's organization.

(iii) Certain members of the conspiracy, including JAMES E. LOFTEN, ROY HARRIS, HENRY MORGAN, JR., JAMES JONES, ROBERT GOODWIN, FURMAN STARR and LEE STEWART, the defendants, participated directly in the distribution of narcotic drugs to the customers of LOFTEN's organization by negotiating for the sale of narcotics, by transporting and/or storing narcotics before and during narcotics transactions, and by receiving and delivering the cash proceeds of narcotics sales.

(iv) Certain members of the conspiracy including JAMES E. LOFTEN, PATRICIA GAINER, VIOLA LINKHORN and ROBERT GOODWIN, the defendants, maintained locations, *i.e.*, stashes and cutting mills, where they concealed narcotics paraphernalia and the proceeds of narcotics sales and where they and other defendants and co-conspirators processed wholesale quantities of high purity narcotics for street-level distribution.

OVERT ACTS

In pursuance of the conspiracy and to effect the objects thereof, the following overt acts, among others, were committed in the Southern District of New York and elsewhere:

1. On or about November 21, 1966, JAMES E. LOFTEN, the defendant, possessed with intent to distribute 1,525 glassine envelopes containing heroin, two bags of heroin, one package of mannite and a weighing scale.

2. On or about November 21, 1966, JAMES E. LOFTEN, the defendant, offered a bribe to a police officer of the Police Department of the City of New York.

3. In or about March 1973, JAMES E. LOFTEN, and ROY HARRIS, the defendants, purchased seven kilograms of cocaine.

4. In or about April 1973, JAMES E. LOFTEN, the defendant, purchased three kilograms of cocaine.

5. On repeated occasions during the period 1966-1975, JAMES E. LOFTEN, ROY HARRIS, JAMES JONES, HENRY MORGAN, JR., and FURMAN STARR, the defendants, processed and sold multi-kilogram quantities of heroin.

6. On or about July 22, 1980, PAUL CHIN, the defendant, arrived in Hong Kong for a two-day visit.

7. On or about August 18, 1980, JAMES E. LOFTEN, the defendant, telephoned his co-conspirator, Anthony Todisco, in order to speak with him in coded terms concerning contemplated purchases by LOFTEN from Todisco's heroin distribution organization.

8. On or about September 3, 1980, co-conspirator Anthony Todisco and his organization possessed with intent to distribute at least 2.5 kilograms of highly pure heroin.

9. On or about September 12, 1980, PAUL CHIN, the defendant, arrived in Hong Kong for a two-day visit.

10. On or about September 22, 1980, ROBERT GOODWIN, the defendant, left an apartment building at 160 Overlook Avenue, Hackensack, New Jersey.

11. On or about October 1, 1980, FURMAN STARR, the defendant, delivered cash to 31 Sheldrake Lane, New Rochelle, New York.

12. On or about October 2, 1980, LEE STEWART, the defendant, distributed approximately one ounce of heroin to a Special Agent of the United States Drug Enforcement Administration who was acting in an undercover capacity.

13. On or about October 8, 1980, LEE STEWART, the defendant, distributed approximately two ounces of heroin to a Special Agent of the United States Drug Enforcement Administration who was acting in an undercover capacity.

14. On or about October 9, 1980, near the Harlem Variety Store at 2061 Adam Clayton Powell Boulevard, New York, New York, JAMES JONES, the defendant, passed a paper bag containing approximately six ounces of heroin to LEE STEWART, the defendant, for distribution to a Special Agent of the United States Drug Enforcement Administration who was acting in an undercover capacity.

15. On or about October 13, 1980, JAMES E. LOFTEN, the defendant, received a telephone call from

HENRY MORGAN, JR., the defendant, at a telephone booth several hundred yards from LOFTEN's home at 31 Sheldrake Lane, New Rochelle, New York.

16. On or about October 14, 1980, JAMES JONES, and LEE STEWART, the defendants, distributed approximately 156.25 grams of heroin to a Special Agent of the Drug Enforcement Administration who was acting in an undercover capacity.

17. On or about October 16, 1980, FURMAN STARR and ROBERT GOODWIN, the defendants, met at the Port Authority Bus Terminal in Manhattan and boarded a bus bound for Detroit.

18. On or about October 16, 1980, LEE STEWART, the defendant, distributed approximately 71.69 grams of heroin to a Special Agent of the Drug Enforcement Administration who was acting in an undercover capacity.

19. On or about October 17, 1980, JAMES E. LOFTEN and PAUL CHIN, the defendants, met at LOFTEN's home at 31 Sheldrake Lane, New Rochelle, New York.

20. On or about October 19, 1980, FURMAN STARR and ROBERT GOODWIN, the defendants, delivered cash to LOFTEN's residence at 31 Sheldrake Lane, New Rochelle, New York.

21. On or about October 20, 1980, JAMES E. LOFTEN, the defendant, placed a telephone call from his residence to VIOLA LINKHORN, the defendant, to discuss the locations in which to store and process narcotics.

22. On or about October 20, 1980, PAUL CHIN, the defendant, left JAMES E. LOFTEN's residence at 31 Sheldrake Lane, New Rochelle, New York.

23. On or about October 21, 1980, PAUL CHIN, the defendant, placed a telephone call to Hong Kong.

24. On or about October 29, 1980, JAMES E. LOFTEN, the defendant, received a telephone call at his

residence from HENRY MORGAN, JR., the defendant, and informed MORGAN that "the Kids", *i.e.* FURMAN STARR and ROBERT GOODWIN, the defendants, would travel to Detroit Michigan the next day.

25. On or about October 30, 1980, FURMAN STARR, and ROBERT GOODWIN, the defendants, in the vicinity of the Port Authority Bus Terminal, attempted to board a bus bound for Detroit, Michigan while in possession of approximately one-half kilogram of heroin.

26. On or about October 31, 1980, while in the vicinity of 160 Overlook Avenue, Hackensack, New Jersey, PATRICIA E. GAINER, the defendant, transported approximately one kilogram of heroin in a shopping bag.

27. On or about October 31, 1980, in an apartment at 160 Overlook Avenue, Hackensack, New Jersey, PATRICIA E. GAINER, the defendant, possessed with intent to distribute approximately one kilogram of heroin.

28. On or about October 31, 1980, in an apartment located at 216 Prospect Avenue, Hackensack, New Jersey, ROBERT GOODWIN, the defendant, possessed approximately seven kilograms of heroin.

(Title 21, United States Code, Section 846).

COUNT TWO
CONTINUING CRIMINAL ENTERPRISE

The Grand Jury further charges:

1. From in or about November 21, 1966 and continuously thereafter up to and including the date of the filing of this indictment, in the Southern District of New York and elsewhere, JAMES E. LOFTEN, a/k/a "Jimmie Haversham", a/k/a "J", the defendant, unlawfully, wilfully, intentionally and knowingly did engage in a continuing criminal enterprise in that he unlawfully, wilfully, intentionally and knowingly did violate Title 21, United States Code, Sections 841(a)(1) and 841(b)(1)(A), as alleg-

ed in Counts One and Three through Eight of this indictment, which are incorporated by reference herein, and did commit other violations of said statutes, which violations were part of a continuing series of violations of said statutes undertaken by the defendant in concert with at least five other persons with respect to whom JAMES E. LOFTEN, a/k/a "Jimmie Haversham", a/k/a "J", the defendant, occupied a position of organizer, supervisor and manager and from which continuing series of violations JAMES E. LOFTEN a/k/a "Jimmie Haversham", a/k/a "J", the defendant, occupied a position of organizer, supervisor and manager and from which continuing series of violations JAMES E. LOFTEN, a/k/a "Jimmie Haversham", a/k/a "J", the defendant, obtained substantial income and resources.

2. As the result of profits obtained by JAMES E. LOFTEN, a/k/a "Jimmie Haversham", a/k/a "J", the defendant, in such enterprise, the defendant did purchase and obtain interests in property (including the property described below), which property is subject to forfeiture to the United States of America:

A. *Real Estate*

(i) A private residence located at 31 Sheldrake Lane, New Rochelle, New York and owned in the name of Jimmie and Roberta Loften and valued at $275,000.

(ii) Improvements paid for by LOFTEN on a private residence located at 130-50 228th Street, Jamaica, Queens, New York, owned in the name of Robert Linkhorn and VIOLA LINKHORN.

(iii) A condominium apartment located at 160 Overlook Avenue, Apartment 12-B, Hackensack, New Jersey, owned in the name of Jimmie and Elizabeth B. Haversham and all valuables located therein, including

phonographic and television equipment, furs, jewelry, artifacts and art works valued in excess of $151,010.

(iv) A tenement apartment building located at 280 East 166th Street, Bronx, New York and owned in the name of Robert Linkhorn.

(v) A two-story commercial building undergoing renovation located at 2132-2138 8th Avenue, New York, New York, owned in the name of 3 Y Douglas Realty Corp.

(vi) A five story tenement apartment building located at 2130 8th Avenue, New York, New York, owned in the name of 3 Y Douglas Realty Corp.

B. *Store*

(i) A commercial enterprise doing business as "Fashion Ranch, Inc." on the first floor of 514 Main Street, New Rochelle, New York.

C. *Motor Vehicles*

(i) One 1935 Mercedes 290B convertible, Serial No. 135388, purchased in the name of PKG Auto Service, Inc., Hasbrook Heights, New Jersey (hereinafter "PKG Auto Service, Inc.").

(ii) One mint condition black 1939 Rolls Royce, N.J. Registration No. 336-MWM, Vehicle Identification No. (hereinafter "VIN") WMB-43.

(iii) One 1957 Eldorado Cadillac, N.J. Registration No. 967-HBF, VIN 5770091804, registered in the name of Roberta Loften.

(iv) One 1970 Lincoln Continental, N.J. Registration No. 969-HBF, VIN OY89A806445, registered in the name of PKG Auto Service, Inc.

(v) One brown 1972 Mercedes Benz 300 SEL sedan, N.J. Registration No. 968-HBF, VIN 0905712000749,

registered in the name of PKG Auto Service, Inc.

(vi) One 1973 Mercedes Benz, N.J. Registration No. 679-JXN, VIN 3K31L569252, registered in the name of PKG Auto Service, Inc.

(vii) One 1976 Oldsmobile, N.J. Registration No. 334-MNM, VIN A 3J29R6D211177, registered in the name of PKG Auto Service, Inc.

(viii) One 1976 Mercedes Benz, N.J. Registration No. 254-MNN, VIN 1603312054743, registered in name of PKG Auto Service, Inc.

(ix) One 1976 Mercedes Benz, N.J. Registration No. 877-MNL, VIN 1511412045060, registered in the name of PKG Auto Sales, Inc.

(x) One 1976 Dodge-AVCO Motorhome, VIN 28GLLDB466, purchased in the name of Jimmie Haversham.

(xi) One 1977 Chevrolet, N.J. Registration No. 470-HBB, VIN CGL257U221896, registered in the name of PKG Auto Service, Inc.

(xii) One 1977 Cadillac Brougham, N.J. Registration No. 370-GCN, VIN A6B69S7Q199513, registered in the name of PKG Realty Corp.

(xiii) One customized 1978 General Motors Van, N.J. Registration No. 446-LLE, VIN TCS348B529569, registered in the name of Roberta Loften, 122 Caspin Avenue, Atlantic City, New Jersey.

(xiv) One 1978 Mercedes Benz, Model 450-SL, N.J. Registration No. 552-MNN, VIN 10704412046255.

(xv) One 1978 Airstream Motor Home Trailer, N.J. Registration No. 582-JCH, VIN E31T8J2389, registered in the name of Mrs. Ora Mae Bell, 122 Caspin Avenue, Atlantic City, New Jersey.

(xvi). One 1978 Pan snowmobile, VIN 8018691 owned in the name of PKG Auto Service, Inc., Hasbrook Heights, New Jersey.

(xvii) One 1978 Buick Estate Wagon, VIN 4R35K8X101366, owned in the named of Roberta Loften.

(xviii) One 1979 Harley Davidson Motorcycle, VIN CY3G3330H9, owned in the name of PKG Auto Service, Inc.

(xix) One 1979 Harley Davidson Motorcycle, VIN 3G2507H9, registered in the name of PKG Auto Service, Inc.

D. *Miscellaneous*

(i) All interests in BOZ Productions, Inc. relating to LOFTEN's $20,000 investment in an option to produce a motion picture based upon a book called "The Fox Is Crazy Too."

(ii) All jewelry located at 31 Sheldrake Lane, New Rochelle, New York.

(iii) A piece of jewelry described as a 14 karat "gent's ring" with one pearl shape diamond, white in color, V.V.S., modern cut with an approximate weight of 6.75 karats and valued at $100,000.

(iv) All funds and securities, including an American Depository Receipt representing 80 shares of Roan Selection Trust, Ltd., certificate number CUSIP 769756-20-6 in the name of JIMMEI LOFTEN.

(Title 21, United States Code, Section 848).

COUNT THREE
DISTRIBUTION OF HEROIN

The Grand Jury further charges:

On or about October 2, 1980, in the Southern District of New York, JAMES E. LOFTEN, a/k/a "Jimmie Haversham," a/k/a "J", ROY HARRIS, a/k/a "The Big Fellow," HENRY MORGAN, JR., a/k/a "D", "Don", PAUL CHIN, a/k/a "Paul Lee", a/k/a "P",

a/k/a "Pizaul," a/k/a "Chizin", PATRICIA E. GAINER, a/k/a "Elizabeth B. Harversham," a/k/a "Patricia E. Haversham," a/k/a "Brandi Haversham," a/k/a "Edna Hanson," JAMES JONES, a/k/a "Crooks", a/k/a "Stein," a/k/a "Stizein," FURMAN STARR, a/k/a "Bimbo", a/k/a "Bo", a/k/a "Bizzo", a/k/a one of "the Kids," ROBERT GOODWIN, a/k/a "Robert Summers", a/k/a "Rizob", a/k/a one of "the Kids", VIOLA LINKHORN and LEE STEWART, a/k/a "Benny", the defendants, intentionally and knowingly did distribute and possess with intent to distribute, a Schedule I narcotic drug controlled substance, to wit, approximately 28.97 grams (net weight) of heroin and diluents.

(Title 21, United States Code, Sections 812, 841(a)(1) and 841(b)(1)(A); Title 18, United States Code, Section 2).

COUNT FOUR
DISTRIBUTION OF HEROIN

The Grand Jury further charges:

On or about October 8, 1980, in the Southern District of New York, JAMES E. LOFTEN, a/k/a "Jimmie Haversham," a/k/a "J", ROY HARRIS, a/k/a "The Big Fellow," HENRY MORGAN, JR., a/k/a "D", "Don", PAUL CHIN, a/k/a "Paul Lee", a/k/a "P", a/k/a "Pizaul," a/k/a "Chizin", PATRICIA E. GAINER, a/k/a "Elizabeth B. Harversham," a/k/a "Patricia E. Haversham," a/k/a "Brandi Haversham," a/k/a "Edna Hanson," JAMES JONES, a/k/a "Crooks", a/k/a "Stein," a/k/a "Stizein," FURMAN STARR, a/k/a "Bimbo", a/k/a "Bo", a/k/a "Bizzo", a/k/a one of "the Kids," ROBERT GOODWIN, a/k/a "Robert Summers", a/k/a "Rizob", a/k/a one of "the Kids", VIOLA LINKHORN and LEE STEWART, a/k/a

"Benny", defendants, unlawfully, intentionally and knowingly did distribute and possess with intent to distribute a Schedule I narcotic drug controlled substance, to wit, approximately 62.58 grams (net weight) of heroin and diluents.

(Title 21, United States Code, Sections 812, 841(a)(1) and 841(b)(1)(A); Title 18, United States Code, Section 2).

COUNT FIVE
DISTRIBUTION OF HEROIN

The Grand Jury further charges:

On or about October 9, 1980, in the Southern District of New York, JAMES E. LOFTEN, a/k/a "Jimmie Haversham," a/k/a "J", ROY HARRIS, a/k/a "The Big Fellow," HENRY MORGAN, JR., a/k/a "D", "Don", PAUL CHIN, a/k/a "Paul Lee", a/k/a "P", a/k/a "Pizaul," a/k/a "Chizin", PATRICIA E. GAINER, a/k/a "Elizabeth B. Harversham," a/k/a "Patricia E. Haversham," a/k/a "Brandi Haversham," a/k/a "Edna Hanson," JAMES JONES, a/k/a "Crooks", a/k/a "Stein," a/k/a "Stizein," FURMAN STARR, a/k/a "Bimbo", a/k/a "Bo", a/k/a "Bizzo", a/k/a one of "the Kids," ROBERT GOODWIN, a/k/a "Robert Summers", a/k/a "Rizob", a/k/a one of "the Kids", VIOLA LINKHORN and LEE STEWART, a/k/a "Benny", defendants, unlawfully, intentionally and knowingly did distribute and possess with intent to distribute, a Schedule I narcotic drug controlled substance, to wit, approximately 183.07 grams (net weight) of heroin and diluents.

(Title 21, United States Code, Sections 812, 841(a)(1) and 841(b)(1)(A); Title 18, United States Code, Section 2).

COUNT SIX
DISTRIBUTION OF HEROIN

The Grand Jury further charges:

On or about October 14, 1980, in the Southern District of New York, JAMES E. LOFTEN, a/k/a "Jimmie Haversham," a/k/a "J", ROY HARRIS, a/k/a "The Big Fellow," HENRY MORGAN, JR., a/k/a "D", "Don", PAUL CHIN, a/k/a "Paul Lee", a/k/a "P", a/k/a "Pizaul," a/k/a "Chizin", PATRICIA E. GAINER, a/k/a "Elizabeth B. Harversham," a/k/a "Patricia E. Haversham," a/k/a "Brandi Haversham," a/k/a "Edna Hanson," JAMES JONES, a/k/a "Crooks", a/k/a "Stein," a/k/a "Stizein," FURMAN STARR, a/k/a "Bimbo", a/k/a "Bo", a/k/a "Bizzo", a/k/a one of "the Kids," ROBERT GOODWIN, a/k/a "Robert Summers", a/k/a "Rizob", a/k/a one of "the Kids", VIOLA LINKHORN and LEE STEWART, a/k/a "Benny", defendants, unlawfully, intentionally and knowingly did distribute and possess with intent to distribute, a Schedule I narcotic drug controlled substance, to wit, approximately 156.25 grams (net weight) of heroin and diluents.

(Title 21, United States Code, Sections 812, 841(a)(1) and 841(b)(1)(A); Title 18, United States Code, Section 2).

COUNT SEVEN
DISTRIBUTION OF HEROIN

The Grand Jury further charges:

On or about October 16, 1980, in the Southern District of New York, JAMES E. LOFTEN, a/k/a "Jimmie Haversham," a/k/a "J", ROY HARRIS, a/k/a "The Big Fellow," HENRY MORGAN, JR.,

a/k/a "D", "Don", PAUL CHIN, a/k/a "Paul Lee", a/k/a "P", a/k/a "Pizaul," a/k/a "Chizin", PATRICIA E. GAINER, a/k/a "Elizabeth B. Harversham," a/k/a "Patricia E. Haversham," a/k/a "Brandi Haversham," a/k/a "Edna Hanson," JAMES JONES, a/k/a "Crooks", a/k/a "Stein," a/k/a "Stizein," FURMAN STARR, a/k/a "Bimbo", a/k/a "Bo", a/k/a "Bizzo", a/k/a one of "the Kids," ROBERT GOODWIN, a/k/a "Robert Summers", a/k/a "Rizob", a/k/a one of "the Kids", VIOLA LINKHORN and LEE STEWART, a/k/a "Benny", defendants, unlawfully, intentionally and knowingly did distribute and possess with intent to distribute, a Schedule I narcotic drug controlled substance, to wit, approximately 71.69 grams (net weight) of heroin and diluents.

(Title 21, United States Code, Sections 812, 841(a)(1) and 841(b)(1)(A); Title 18, United States Code, Section 2).

COUNT EIGHT

DISTRIBUTION OF HEROIN

The Grand Jury further charges:

On or about October 30, 1980, in the Southern District of New York, JAMES E. LOFTEN, a/k/a "Jimmie Haversham," a/k/a "J", ROY HARRIS, a/k/a "The Big Fellow," HENRY MORGAN, JR., a/k/a "D", "Don", PAUL CHIN, a/k/a "Paul Lee", a/k/a "P", a/k/a "Pizaul," a/k/a "Chizin", PATRICIA E. GAINER, a/k/a "Elizabeth B. Harversham," a/k/a "Patricia E. Haversham," a/k/a "Brandi Haversham," a/k/a "Edna Hanson," JAMES JONES, a/k/a "Crooks", a/k/a "Stein," a/k/a "Stizein," FURMAN

STARR, a/k/a "Bimbo", a/k/a "Bo", a/k/a "Bizzo", a/k/a one of "the Kids," ROBERT GOODWIN, a/k/a "Robert Summers", a/k/a "Rizob", a/k/a one of "the Kids", VIOLA LINKHORN and LEE STEWART, a/k/a "Benny", and VIOLA LINKHORN, the defendants, unlawfully, intentionally and knowingly did distribute and possess with intent to distribute, a Schedule I narcotic drug controlled substance, to wit, approximately 491.45 grams (net weight) of heroin and diluents.

(Title 21, United States Code, Sections 812, 841(a)(1) and 841(b)(1)(A); Title 18, United States Code, Section 2).

COUNT NINE
RACKETEERING CONSPIRACY

The Grand Jury further charges:

1. From on or about November 21, 1966, and continuously thereafter up to and including the date of the filing of this indictment, in the Southern District of New York and elsewhere, the defendants, JAMES E. LOFTEN, a/k/a "J", a/k/a "Jimmie Haversham", ROY HARRIS, a/k/a "The Big Fellow", JAMES JONES, a/k/a "Crooks", a/k/a "Stein," a/k/a "Stizein" and ALBERT H. SOCOLOV, and others to the Grand Jury known and unknown, unlawfully, wilfully and knowingly combined, conspired, confederated and agreed, together and with each other, to violate the racketeering laws of the United States, specifically Section 1962(a) of Title 18, United States Code.

THE OBJECTS OF THE CONSPIRACY

2. It was a part of the conspiracy that the defendants JAMES E. LOFTEN, ROY HARRIS and JAMES JONES, who had received and would receive income

derived directly and indirectly from a pattern of racketeering activity, including dealing in narcotics and other dangerous drugs, as more fully described below, would and did use and invest directly and indirectly part of the proceeds derived directly and indirectly from said pattern of racketeering activity in the acquisition of an interest in and the establishment and operation of certain enterprises described below, which enterprises were and are engaged in and the activities of which affect interstate and foreign commerce.

3. It was a further part of said conspiracy that ALBERT H. SOCOLOV, the defendant, knowing that JAMES E. LOFTEN, ROY HARRIS, and JAMES JONES, the defendants, had received and would receive income derived directly and indirectly from a pattern of racketeering activity, as set forth above, would and did counsel, facilitate, aid and abet the defendants JAMES E. LOFTEN, ROY HARRIS and JAMES JONES, in using and investing directly and indirectly part of the income and the proceeds of the income they had derived from said pattern of racketeering activity in the acquisition of and interest in and the establishment and operation of certain enterprises described below, which enterprises would and did engage in and the activities of which would and did affect interstate and foreign commerce.

4. It was a further part of said conspiracy that JAMES LOFTEN, ROY HARRIS and JAMES JONES, the defendants, aided and abetted by ALBERT H. SOCOLOV, the defendant, would and did acquire, operate, maintain and renovate buildings located at 2130-2138 8th Avenue, New York, New York, through a series of New York corporations known as Two Jim Realty Co., Inc. and Three Y Douglas Realty Corp., and would acquire and renovate other buildings located in Harlem, the Bronx, and the lower East Side of Manhattan.

5. It was a further part of said conspiracy, that JAMES E. LOFTEN, ROY HARRIS and JAMES JONES, the defendants, aided and abetted by ALBERT H. SOCOLOV, the defendant, would form enterprises to operate a check cashing business, liquor store, pool hall, warehouse and restaurant in a commercial building at 2132-2138 8th Avenue, New York, New York.

6. It was a further part of said conspiracy that JAMES E. LOFTEN, ROY HARRIS, and JAMES JONES, the defendants, aided and abetted by ALBERT H. SOCOLOV, the defendant, would form an enterprise to acquire, develop and operate gold and silver mines and mining claims located in and about the Sheep Tanks Mining District, Yuma County, Arizona, including claims known as "Bronco-Oakland-Verdstone Mining Property," which claims allegedly had proven ore reserves valued in excess of several hundred million dollars.

7. It was a further part of said conspiracy that JAMES E. LOFTEN, ROY HARRIS, and JAMES JONES, the defendants, aided and abetted by ALBERT H. SOCOLOV, the defendant, would form an enterprise to purchase diamonds for resale to investors in Japan and other foreign nations.

8. It was a further part of said conspiracy that JAMES E. LOFTEN, ROY HARRIS, and JAMES JONES, the defendants, aided and abetted by ALBERT H. SOCOLOV, the defendant, would form an enterprise to purchase interests in mineral resources located in Zimbabwe.

THE PATTERN OF RACKETEERING ACTIVITY

9. The pattern of racketeering engaged in and conducted by the defendants JAMES E. LOFTEN, JAMES

JONES and ROY HARRIS, set forth above, included the following:

(a) On or about November 21, 1966, JAMES E. LOFTEN unlawfully, wilfully and knowingly possessed with intent to distribute heroin;

(b) On or about November 21, 1966, JAMES E. LOFTEN unlawfully, wilfully and knowingly offered, promised and agreed to give and to cause to be given and offered to a police officer of the Police Department of the City of New York, duly appointed pursuant to law and duly acting as such, a bribe and a certain sum of money with intent to influence thereby said police officer in the exercise of his official duties and functions;

(c) In or about March, 1973, JAMES E. LOFTEN and ROY HARRIS unlawfully, wilfully and knowingly did distribute and possess with intent to distribute approximately 7 kilograms of cocaine;

(d) In or about April, 1973, JAMES E. LOFTEN unlawfully, wilfully and knowingly did distribute and possess with intent to distribute approximately 3 kilograms of cocaine;

(e) On repeated occasions during the period 1966-1975, JAMES E. LOFTEN, ROY HARRIS and JAMES JONES, together with Henry Morgan, Jr. and Furman Starr, unlawfully, wilfully and knowingly did distribute and possess with intent to distribute heroin;

(f) On or about each of the dates set forth in Counts Three through Eight of this indictment, JAMES E. LOFTEN, ROY HARRIS and JAMES JONES, together with the defendants named in those Counts, unlawfully, wilfully and knowingly did distribute and possess with intent to distribute heroin;

(g) On or about October 31, 1980, JAMES E. LOFTEN, ROY HARRIS and JAMES JONES, together with the defendant Patricia E. Gainer, unlawfully, wilful-

ly, and knowingly did distribute and possess with intent to distribute at least two kilograms of heroin at 160 Overlook Avenue, Apt. 12-B, Hackensack, New Jersey;

(h) On or about October 31, 1980, JAMES E. LOFTEN, ROY HARRIS and JAMES JONES, together with the defendant Robert Goodwin, unlawfully wilfully and knowingly did distribute and possess with intent to distribute approximately seven kilograms of heroin at 216 Prospect Avenue, Apt. 2-A, Hackensack, New Jersey.

THE MEANS USED BY THE DEFENDANTS AND THEIR CO-CONSPIRATORS TO FURTHER THE OBJECTS OF THE CONSPIRACY.

10. Among the means whereby the defendants and their co-conspirators would and did carry out the objects of the conspiracy and insure the success of their venture to use and invest the proceeds of said pattern of racketeering activity to acquire and invest in enterprises in and affecting interstate and foreign commerce were the following:

The conspiracy took the form of a loosely-knit investment group with members performing different functions and operating at different levels of responsibility.

(i) The head of the group and principal investor was the defendant JAMES E. LOFTEN who had ultimate responsibility for determining the investment policies and operating decisions of the investment group.

(ii) Financial partners with LOFTEN in the investment group were defendants ROY HARRIS and JAMES JONES. HARRIS was consulted by LOFTEN in connection with investment and operating decisions. JONES, in addition to being an investor, was directly involved in real estate operations.

(iii) Defendant ALBERT H. SOCOLOV was a business and legal consultant employed by the investment group: to locate, analyze and evaluate various investment

opportunities; to advise and negotiate on behalf of the group; to supervise the renovation and subsequent operation of commercial real estate owned by LOFTEN, HARRIS, and JONES; and to accompany LOFTEN, HARRIS and JONES on business investment trips.

OVERT ACTS

In pursuant of the conspiracy and to effect the objects thereof, the following overt acts, among others, were committed in the Southern District of New York and elsewhere:

1. On or about February 13, 1973, ALBERT H. SOCOLOV caused to be incorporated Two Jim Realty Co. inc., a New York corporation controlled by JAMES E. LOFTEN, JAMES JONES and others, for the purpose of acquiring a commercial building located at 2132-2138 Eighth Avenue, New York, New York, hereinafter "the commercial building," as well as a residential-commercial building located at 2130 Eighth Avenue, New York, New York.

2. On or about January 23, 1975, ALBERT H. SOCOLOV pledged a two-family house valued at $120,000 as collateral to obtain the release of JAMES JONES pending trial on criminal charges.

3. On or about June 10, 1977, ALBERT H. SOCOLOV caused a mortgage on the properties located at 2130-2138 Eighth Avenue, New York, New York, to be assigned to a "straw man" nominee ("straw man") under SOCOLOV's control.

4. On or about December 7, 1978, ALBERT H. SOCOLOV caused his straw man to foreclose all outstanding mortgages on the properties located at 2130-2138 Eighth Avenue, New York, New York, and to obtain title to these properties.

5. In or about May 1980, ALBERT H. SOCOLOV caused to be incorporated 3 Y Douglas Realty Corp., a New York corporation.

6. On or about June 3, 1980, ALBERT H. SOCOLOV caused his straw man to transfer title to the properties located at 2130-2138 Eighth Avenue, New York, New York, to 3 Y Douglas Realty Corp.

7. On or about August 19, 1980, ALBERT H. SOCOLOV paid the engineer and contractor for the commercial building $5,000 in cash.

8. On or about August 25, 1980, ALBERT H. SOCOLOV paid the engineer and contractor for the commercial building $7,000 in cash.

9. On or about September 22, 1980, ALBERT H. SOCOLOV telephoned JAMES E. LOFTEN and discussed the investment of $250,000 in an Arizona gold mine and the purchase of diamonds for resale in Asia.

10. On or about September 24, 1980, JAMES E. LOFTEN, in the presence of ALBERT H. SOCOLOV and JAMES JONES, at 2132-2138 8th Avenue, New York, New York, provided $20,000 in cash to the engineer and contractor for the commercial building.

11. On or about September 24, 1980, JAMES E. LOFTEN was telephoned by JAMES JONES and discussed efforts to obtain land adjacent to the commercial building.

12. On or about September 30, 1980, JAMES E. LOFTEN telephoned ALBERT H. SOCOLOV and discussed diamond investments, the renovation of the commercial building and an application to operate a check cashing enterprise.

13. In or about the period October 6-9, 1980 JAMES E. LOFTEN, ROY HARRIS, and ALBERT H. SOCOLOV toured gold mine sites in Yuma County, Arizona.

14. On or about October 12, 1980, JAMES E. LOFTEN telephoned JAMES JONES to inform him of the results of his inspection of the gold mines in Yuma County, Arizona.

15. On or about October 14, 1980, JAMES E. LOFTEN telephoned ROY HARRIS to discuss progress on the renovation of the commercial building.

16. On or about October 17, 1980, ALBERT H. SOCOLOV telephoned JAMES E. LOFTEN to discuss the acquisition of real estate, renovations to the commercial building, the investment of $500,000 in the Arizona gold mines and ALBERT H. SOCOLOV's "stake" in the gold mines.

17. On or about October 20, 1980, JAMES E. LOFTEN telephoned ALBERT H. SOCOLOV and discussed renovations to the commercial building and contemplated diamond investments.

18. On or about October 21, 1980, JAMES E. LOFTEN, ALBERT H. SOCOLOV and others met to select equipment for the commercial building.

19. On or about October 23, 1980, JAMES E. LOFTEN and JAMES JONES discussed the investment of funds in the commercial building.

20. On or about October 23, 1980, ALBERT H. SOCOLOV met with JAMES E. LOFTEN and JAMES JONES at 31 Sheldrake Lane, New Rochelle, New York.

21. On or about October 24, 1980, ALBERT H. SOCOLOV telephoned JAMES E. LOFTEN to inform him that JONES had been arrested that day.

22. On or about October 27, 1980, JAMES E. LOFTEN asked ALBERT H. SOCOLOV to telephone JAMES JONES on LOFTEN's behalf because LOFTEN did not want to call JONES directly.

23. On or about October 27, 1980, JAMES E. LOFTEN telephoned ALBERT H. SOCOLOV and

SOCOLOV confirmed that he would accompany LOFTEN on a trip to Zimbabwe in January 1981.

24. On or about October 29, 1980, JAMES E. LOFTEN telephoned ALBERT H. SOCOLOV and discussed the Arizona gold mines.

25. On or about October 29, 1980, JAMES E. LOFTEN telephoned ROY HARRIS and discussed the Arizona gold mines.

26. On or about October 31, 1980, ALBERT H. SOCOLOV telephoned JAMES E. LOFTEN, and LOFTEN informed SOCOLOV both that Furman Starr and Robert Goodwin had been arrested for "possession" or "distribution" and that LOFTEN was "scared to death".

27. On or about October 31, 1980, JAMES E. LOFTEN telephoned ALBERT H. SOCOLOV and discussed renovation of the commercial building, the Arizona gold mines and the arrests of Starr and Goodwin.

28. On or about October 31, 1980, JAMES E. LOFTEN telephoned ROY HARRIS and suggested that the release of Starr and Goodwin on bail might be able to be obtained the same way SOCOLOV had obtained JONES' release on bail in 1975.

FORFEITURE

29. As a result of JAMES E. LOFTEN, JAMES JONES, ROY HARRIS and ALBERT H. SOCOLOV, the defendants, acquiring, operating, maintaining and renovating the buildings and properties located at 2130-2138 Eighth Avenue, New York, New York, in violation of Title 18, United States code, Section 1962(a), as set forth in this Count, said interests are now forfeitable to the United States of America.

(Title 18, United States Code, Sections 1962(d), 1963 and Section 2.)

COUNT TEN

EVASION OF TAX PAYMENT

The Grand Jury further charges:

From on or about the 1st day of January, 1978, and continuously thereafter up to and including October 31, 1980, in the Southern District of New York and elsewhere, JAMES E. LOFTEN, a/k/a "Jimmie Haversham" a/k/a "J", the defendant, did unlawfully, wilfully and knowingly attempt to evade and defeat the payment of a large part of the taxes, as hereinafter set forth, due and owing by the defendant JAMES E. LOFTEN to the United States of America, duly assessed on the dates and in the amounts and for the calendar years set forth below, by concealing and attempting to conceal from the Internal Revenue Service the nature and source of his income and assets, and the location thereof; and by placing funds, assets and property in the names of nominees, fictitious persons and entities and sham corporations, thereby placing said funds, assets and property beyond the reach of service of lawful process.

MONIES OWED RELATING TO THE UNITED STATES JOINT INCOME TAX RETURNS OF JIMMIE AND ROBERTA LOFTEN

Tax Year	*Date of Assessment*	*Assessed Amount*	*Taxes Paid*	*Tax Due*
1978	June 18,1979	$64,936	$58,262	$ 6,674
1979	April 15,1980	$48,652	$10,000	$38,652

(Title 26, United States Code, Section 7201 and Title 18, United States Code, Section 2.)

Foreman

JOHN S. MARTIN, JR.
United States Attorney

APPENDIX B—OPINION OF DISTRICT COURT

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

UNITED STATES OF AMERICA,

v.

JAMES E. LOFTEN, et al.,

Defendants.

S 80 Cr. 729 (GLG)

MEMORANDUM DECISION

In this rather unusual indictment, eleven individuals[1] are charged with a variety of crimes. The connecting link is Count One, which charges all but one of the defendants with conspiring to operate a massive narcotics ring, distributing large amounts of herion and cocaine. *See* 21 U.S.C. §§ 812, 841(a)(1), 841(b)(1)(A). Count Two of the indictment charges a continuing criminal enterprise. *See* 21 U.S.C. § 848. Counts Three through Eight concern distribution of herion by various of the defendants, sometimes in fairly substantial amounts. *See* 21 U.S.C. §§ 812, 841(c)(1), 841(b)(1)(A) and 18 U.S.C. § 2. Count Nine charges a racketeering conspiracy, commencing in November of 1966 and continuing until the date of the indictment. *See* 18 U.S.C. §§ 1962(a), 1962(d), 1963. (This count seeks forfeiture of certain buildings in New York City.) Count Ten charges a tax evasion. *See* 26 U.S.C. § 7201

and 18 U.S.C. §2. Only defendant James E. Loften is named in Count Ten and also in all of the other counts. He is allegedly the kingpin of the narcotics operation. The other defendants are named in only some of the counts, and one defendant, Albert H. Socolov, a New York attorney, is named only in the RICO count.[2]

Much of the evidence used to obtain this indictment was the result of the court-ordered wiretaps on the two telephones in Loften's home. All of the arrested defendants, except one,[3] now move to suppress the wiretap evidence on a variety of grounds.

1. The allegations of probable cause in the initial application for the wiretaps were false or otherwise inadequate.

2. The wiretap tapes were not sealed in accordance with federal requirements.

3. The agents failed to exhaust normal investigative techniques before seeking the wiretap warrant.

4. The applications were not properly authorized by the Attorney General of the United States.

5. The surveillance was carried on after the attainment of the authorized objective.

6. The agents failed to comply with minimization requirements.

7. The intercepted conversations between Loften and attorneys were privileged.

8. The taps were the fruit of another wiretap, which is claimed to have been illegal, thereby tainting these taps.

Besides joining in the foregoing motion,[4] defendant Socolov has also moved to suppress the wiretap evidence on additional grounds having to do with the RICO aspects of the taps. He also adds one minor point concerning the alleged failure of the monitoring agents to follow their own internal instructions. With the exception of this latter point, the major issues discussed in the Socolov motions will be considered at a subsequent time.

The issues raised in the joint motion will be considered seriatim.

Probable Cause in the Initial Wiretap Application

The Government's original application for the wiretaps is dated September 19, 1980. It is quite voluminous. Its essential element is an affidavit signed by Agent Corcoran of the Drug Enforcement Agency ("DEA"). The major aspects of the application, as they relate to probable cause, are the following:

1. Loften's prior arrest record, which includes narcotics charges;

2. a *New York Times* article (from some years back) identifying Loften as a major supplier of herion in this district;

3. the testimony of two witnesses in a prior federal prosecution concerning Loften's involvement in narcotics distribution;

4. Loften's involvement with the Anthony Todisco herion ring;

5. telephone conversations between Todisco and Loften allegedly involving narcotics transactions;[5] and

6. a list of "documented narcotics traffickers" whom Loften supposedly called after Todisco's arrest, as disclosed by a pen register installed by state officials.[6]

The defendants particularly attack the list of twelve supposed documented narcotics traffickers allegedly called after Todisco's arrest. They also dispute the accuracy of the reference to the two witnesses' testimony and certain aspects of the statements concerning Loften's relationship with Todisco. In addition, they challenge the correctness of statements made concerning the attempted use of other normal investigative techniques before seeking a warrant.

The Court held evidentiary hearings lasting several days, at which the two DEA agents most involved in preparing the affidavit, Corcoran and Sandler, testified about the numerous inaccuracies and errors in the Corcoran affidavit.[7] The evidence established that the listing of the documented narcotics traffickers was a very poorly executed project. Many telephone numbers and names were misrecorded or transposed. In addition, few of those listed were narcotics traffickers of any consequence. Moreover, it developed that many of them did not call Loften *after* Todisco's arrest.

The Government's approach to these numerous errors and overstatements is to concede their inaccuacy and suggest that the Court ignore that portion of the affidavit completely, relying on the strong showing of probable cause in the remainder of the affidavit. The defendants respond that the errors cannot be ignored on that basis, since, even if there was no knowing and intentional submission of false statements, if the erroneous portions of the affidavit were submitted with a reckless disregard for the truth, the fruits of the application must be suppressed. *Franks v. Delaware,* 438 U.S. 154, 155-56 (1978)[8]

The testimony of Agent Sandler was to the effect that he was the one assigned to compile this list, that he was given only four hours in which to compile it, that he did not know that it was to contain only persons who called Loften after Todisco's arrest, and that he did not know that it was to concern only "documented narcotics traffickers." Having heard his testimony in this regard, the Court is prepared to accept these statements. One reason for accepting the agent's explanation is the large number of purely clerical errors that infiltrated his list. These clerical errors did not benefit the Government and clearly were not intentional. Paradoxically, the general inefficiency of the agents establishes their lack of improper motive.

More troublesome is the agent's (and, indeed, the agency's) persistent use of large amounts of unevaluated intelligence information without disclosing to the Court that the information is often no more than rumor. Moreover, in some instances, they were obtaining information on common names (such as Juanita Brown, Paul Chin, and Elizabeth Haversham), with the result that the data received often concerned persons other than the particular individuals in whom they were interested. It was, as the English would say, a "bad show."

The defendants also complain about the failure to advise the Court that one of the alleged narcotics traffickers was, in fact, Loften's cousin, whom he would have had legitimate reasons to be calling. However, that point cuts two ways. The fact that Loften had a cousin with narcotics ties is reason for suspecting Loften himself, since, in the narcotics trade, family ties are often important. *See, e.g., United States v. Manfredi,* 488 F.2d 588 (2d Cir. 1973), *cert. denied,* 417 U.S. 936 (1974). In the Todisco case, which investigation gave rise to this one, Todisco was the uncle of one codefendant and the nephew of another.

With respect to the alleged misdescription of Loften's activities by two earlier witnesses (in an earlier case, *United States v. Moten,* 76 Cr. 324 (S.D.N.Y. 1976), there undoubtedly was an ambiguity (or discrepancy) as to whether one of the witnesses was selling narcotics *to* Loften or *for* Loften. In either event, however, the activity established Loften's involvement with narcotics traffic. In addition, the testimony of the other witness clearly supported the Corcoran affidavit's allegations about Loften's involvement.

The complaints concerning the accuracy of the references to Loften and Todisco do not seem of any great consequence. The most important aspect of the Todisco connection was to establish that Loften could continue in the trade despite the arrest and breakup of the Todisco

ring. The Corcoran affidavit accurately described Loften's longtime reputation in the trade (including the recognition of his status in the *New York Times*) and the fact that Loften was purchasing for a large distribution ring (indicating that Loften probably had more than one source of supply and would rapidly seek new sources once Todisco was cut off). The affidavit also described information obtained from the Westchester County Police that Loften continued to telephone narcotics traffickers following Todisco's arrest, that his cousin, defendant Roy Harris, a suspect in the trade, was seen leaving Loften's house with a package, and that Loften had been seen dealing with defendant Paul Chin, who informants had indicated was another source of herion.[9]

In their post-hearing memorandum, the defendants concentrate heavily on alleged discrepancies in the allegations concerning the extent to which the Government had explored other investigative techniques, as revealed by the testimony of Agent Corcoran.[10] This is not entirely fair, since the evidentiary hearing was not directed toward that issue. Agent Corcoran had not been prepared on that issue, with the result that his memory seemed poor on a number of points.

It is true that Corcoran's testimony did not support his affidavit claim concerning substantial efforts being made to locate a confidential informant who could provide entrance into the Loften organization. Corcoran also had little personal knowledge about attempts to conduct surveillance of Loften and his efforts to avoid surveillance. The fallacy in analyzing Corcoran's knowledge as of the time he testified, however, is that the earlier active investigation of Loften had been conducted by the Westchester County Police. The officer in charge of that investigation had given Corcoran certain information about the status of the Loften investigation, including the earlier-mentioned fact that, even following the arrest of

Todisco, Loften was still active in the trade and was calling a great number of people. The Westchester County Police had conducted a three-and-one-half month investigation, which included manual pen-register monitoring.[11] In addition, the Westchester County Police made attempts at conducting surveillance of Loften's operations. (Corcoran believed that this occurred between August 18 and September 3, 1980.)

The defendants' most emphatic attack is on the allegation that the DEA was unable to obtain informants concerning Loften. Actually, all the Corcoran affidavit stated was that the DEA could not get a confidential informant who was in a position to introduce an undercover agent to Loften who might thereby infiltrate Loften's operation. Obviously, such a well-placed connection is not easy to come by. Both the Westchester County Police and the New York City Police had advised Corcoran that they knew of no informant who could do what they wanted. In the final analysis, however, underlying most of the Corcoran allegations is the fact that Loften's activities were known in a general sense for such a long period of time, and so publicly, that the failure of the DEA to acquire any usable evidence over this period indicated the extreme difficulties in penetrating his organization without the wiretaps.

In summary, while there were a number of deficiencies and inaccuracies in the wiretap application, particularly in the list of so-called documented narcotics traffickers, the sections of the affidavit concerning Loften's background and involvement with the Todisco herion ring provide an abundance of evidence supporting probable cause.

The defendants argue that to uphold the wiretaps despite the rampant misstatements will constitute a precedent for continuing the practice in the future. Undoubtedly, this Court's supervisory power gives it wider latitude to

control governmental behavior than that constitutionally required. *United States v. Edmons,* 432 F.2d 577, 585 (2d Cir. 1970). The defendants' interest in improving law enforcement practices is, of course, quite hypocritical; what they are really interested in is having the evidence against them excluded so that they may walk free from these charges.

This Court has previously indicated its doubts about the efficacy of the exclusionary rule in accomplishing law enforcement reform. *See United States v. Rosario,* 638 F.2d 460, 465-66 (2d Cir. 1980), (Goettel, J., dissenting). But that is not the only reason for hesitating to invoke the exclusionary rule in this instance. While it would undoubtedly be desirable to improve a number of practices of the DEA (which has a reputation for being something of a free-wheeling operation), in this instance it cannot be said that the deficiencies of that office (as well as those of the United States Attorney's office in failing to detect the errors) are so great as to warrant the drastic remedy of throwing out most of the substantial evidence about an allegedly very large and well-financed narcotics operation.

The Sealing of the Tapes

The defendants also move to suppress the wiretap evidence on the ground that the tapes were not immediately sealed "upon the expiration of the period of the order, or extensions thereof," as required by 18 U.S.C. § 2518(8)(a).

The initial wiretap authorization was issued on September 19 and was to expire on October 9. On October 3, the Government halted the monitoring when Loften left the New York area for a trip to Arizona. (The Government characterizes this as a temporary cessation of serveillance to minimize the intrusiveness of the wiretap

order. The defendants claim that it marks the expiration of the period of the wiretap order.) On October 10, twenty-four hours after the September 19 order expired, the Government obtained authorization for another twenty days of electronic surveillance. On October 30, the Government obtained authorization for an additional thirty days. However, the Government terminated the surveillance the next evening, on October 31, following Loften's arrest earlier that day. The tapes were subsequently sealed on November 7, 1980, seven days after the termination of the electronic surveillance.

The first part of the defendant's argument focuses on the tapes recorded during the initially authorized period, September 19 to October 9. The defendants argue that these tapes should have been sealed immediately upon the termination of the surveillance when Loften went to Arizona on October 9. The Government responds that no sealing was necessary at that point because the authorization for the surveillance conducted pursuant to the orders of October 10 and October 30 were "extensions" of the September 19 order.

As has been noted, the statue directs the immediate sealing of the tapes "upon the expiration of the period of the order, or *extensions* thereof." 18 U.S.C. § 2518(8)(a) (emphasis added). It is well settled that the term "extensions" is to be interpreted "in a common sense fashion as encompassing all consecutive continuations of a wiretap order, however designated, where the surveillance involves the same telephone, the same premises, the same crimes, and substantially the same persons." *United States v. Vazquez,* 605 F.2d 1269, 1278 (2d Cir.), *cert.denied,* 444 U.S. 981 (1979). *See also United States v. Scafidi,* 564 F.2d 633, 641 (2d Cir. 1977), *cert. denied,* 436 U.S. 903 (1978); *United States v. Fury,* 554 F.2d 522, 533 (2d Cir. 1977), *cert. denied,* 436 U.S. 931 (1978). Using this interpretation, the Court concludes that the October 10 and October

30 authorizations were clearly "extensions" of the September 19 order. (Indeed, the October 10 order was entitled as an application for an "Extension of Interception of Wire Communications.") Since sealing is not required until the expiration of the last extension, *United States v. Vazquez, supra,* 605 F.2d at 1276; *United States v. Scafidi, supra,* 564 F.2d at 641; *United States v. Fury, supra,* 554, F.2d at 533, the defendants' motion to suppress on this ground must be denied.[12]

The defendant's second argument is that all of the tapes should be suppressed because of the seven-day delay from the termination of the surveillance on October 31 to the sealing of the tapes. The Government responds that the delay should be excused because it has a reasonable explanation of how the delay occurred.[13] *See United States v. McGrath,* 622 F.2d 36, 42-43 (2d Cir. 1980); *United States v. Vazquez, supra,* 605 F.2d at 1278; *United States v. Fury, supra,* 554 F.2d at 533.

An affidavit filed by Philip Le B. Douglas, the Assistant United States Attorney in charge of the investigation, details the reasons for the seven-day delay on a day-to-day basis. Days One and Two were weekend days. Most of the tapes were locked in a DEA vault, which could not be opened until the following Monday. The remaining tapes were at the monitoring plant in New Rochelle, New York. Douglas notes that he was occupied with the drafting of complaints on these two days as well as with the preparation of search warrants. The DEA agents assigned to the case, meanwhile, were attempting to locate and arrest three of the defendants who were still at large. Douglas explains that on Day Three, the agents were occupied with the initial appearance of defendants Chin and Linkhorn and the attempt to locate fugitive Jones. He also explains that he personally was busy with matters concerning the search of the offices of defendant Socolov, who at that

time was not a defendant in the case. Douglas is not very clear about what happened on Day Four. It seems that the agents were still attempting to locate the fugitives and that Douglas was preparing the indictment in this case. It also appears that the agents began the administrative process of preparing the tapes to be sealed, because on Day Five, Douglas contacted the chambers of the judge who had initially issued the wiretap order to obtain a time when he could have the tapes sealed. Douglas was told that the judge would not be available until that Friday, Day Seven, because the judge was engaged in a trial. The Government decided to wait until then rather than appear before another judge, because the extra delay involved seemed fairly short.[14]

Section 2518 (8)(a) clearly states that the judicial sealing must be *immediate.* "Immediate" has been interpreted in this circuit to mean sealing within one or two days. *United States v. Vazquez, supra,* 605 F.2d at 1278. Admission into evidence of tapes that have been sealed after more than a one-or two-day delay is contingent upon the Government's establishing a "satisfactory explanation" for the delay. *Id.* at 1274. While the Second Circuit has noted that "no clear consensus" exists as to what is a satisfactory explanation, *id.* at 1278, it has recently outlined the various factors to be considered in determining whether such a reasonable explanation has been offered: (1) the length of the delay; (2) evidence of any tampering with the tapes; (3) the amount of time necessary to prepare the tapes for sealing; and (4) the prejudice to the defendants as a result of the delay. *United States v. McGrath, supra,* 622 F.2d at 42-43.

The Court concludes that the delay in this case has been adequately explained. The administrative difficulties resulting from the abrupt termination of the surveillance increased the amount of time that was necessary to prepare the tapes for sealing. There were 250 reels of tapes

to be processed and inventoried. Most of the tapes were in a locked vault at the DEA offices and, as noted earlier, could not be retrieved until Day Three. Moreover, the inventory process was slowed by the fact that power outages had precluded the recording of conversations that had been accorded exhibit numbers. Since the Government was simultaneously involved with the processing of the defendants who had been arrested, as well as the capture of those still at large, the seven-day delay does not seem unreasonable, considering that the first two days were a weekend and the last two were due to the unavailability of the judge. Moreover, the defendants do not allege that the tapes had been tampered with, nor do they suggest that they have been prejudiced by the delay. With respect to the length of the delay, delays of similar and even longer lengths have been excused by courts in this circuit. *See United States v. Vazquez, supra* (7-to 13-day delays); *United States v. Scafidi, supra* (7-day delay excused); *United States v. Fury, supra* (6-day delay); *United States v. Aloi,* 449 F. Supp. 698 (E.D.N.Y. 1977) (6-and 7-day delays).

Of course the Court is aware of the Second Circuit's admonition that "today's satisfactory explanation may very well be tomorrow's lame excuse." *United States v. Vazquez, supra,* 605 F.2d at 1280. Thus, the explanation that the surveillance was abruptly terminated will not carry as much weight in the future, since, "law enforcement officials must be expected to learn from their own experiences and those of others." *Id.* That an arrest may be unanticipated does not mean it is unforeseeable. Events frequently require earlier-than-planned arrests, which, in turn, result in an abrupt termination of electronic surveillance. The Government must either prepare for this contingency by having sufficient equipment and personnel available so that the tapes are sealed in accordance with

the law and risk the consequences of having the tapes excluded from the evidence.

Considering that there had already been several days' delay when the Government learned that the judge who had signed the order was engaged in a trial, they should have asked his permission to take the matter to the Part I Judge, rather than waiting two additional days. Of course, only large courts have an emergency judge available, so it would not seem appropriate to lay down a strict rule that, where tapes have not been sealed following a weekend and three working days, and it is not convenient for the judge to hear the matter for two more days, the application *must* be made to another judge. Consequently, while hindsight suggests the prudence of so proceeding in this instance, the tapes will not be suppressed because of this additional delay.

Availability of Alternative Investigative Techniques

An applicant for an order authorizing a wiretap must state, and the judge issuing the order must find, that normal investigative procedures "have been tried and failed" or "reasonably appear to be unlikely to succeed if tried or to be too dangerous." 18 U.S.C. §§ 2518(1)(c), 2518(3)(c).

The Loften wiretap application alleges the following explanation for why normal investigative procedures were insufficient: Physical surveillance of Loften's home was difficult because it is located in a residential area. Attempts to follow Loften had been unsuccessful, as Loften took affirmative steps to avoid surveillance. Telephone toll records and pen-register information were inadequate because they did not reveal the subjects discussed. Obtaining a search warrant to search Loften's home was of limited value because such a search would not reveal the full scope of the conspiracy even if narcotics were found.

Substantial but unsuccessful efforts had been made to locate an informant. And it was unlikely that the Loften organization could be infiltrated with undercover agents.

The defendants contend that these explanations are unsatisfactory because the section of the Government's wiretap application concerning exhaustion mirrors a wiretap application submitted in *United States v. Todisco,* 80 Cr. 563 (S.D.N.Y.), and because it contains boilerplate allegations that have no factual support.[15] They claim, in particular, that the Government's allegation that physical surveillance was difficult is contradicted by the Government's assertion in other papers that Loften had been observed and followed on September 9, 24, 25, and 26, and October 2 and 16. In addition, they argue that the allegations concerning toll records, the use of a grand jury, the unavailability of informants, and the lack of value in searching Loften's home are mere conclusory allegations, which do not satisfy the alternative techniques requirement. *See* discussion of alleged inaccuracies in these allegations *supra.*

The Court did not conduct a hearing on this issue because the defendants' allegations, even if proved, are insufficient to warrant the suppression of the tapes on this ground. The Supreme Court has noted that this requirement "is simply designed to assure that wiretapping is not resorted to in situations where traditional investigative techniques would suffice to expose the crime." *United States v. Kahn, 415 U.S. 143, 153 n.12 (1974). See also United States v. Scafidi, supra,* 564 F.2d at 641; *United States v. Fury, supra,* 554 F.2d at 530. The Government must "inform the issuing judge of the difficulties involved in the use of conventional techniques." *United States v. Fury, supra,* 559 F.2d at 530 (quoting *United States V. Pacheco,* 489 F.2d 554, 565 (5th Cir. 1974), *cert. denied,* 421 U.S. 909 (1975)). The Government, however, is not required to prove beyond a shadow of a doubt that ordinary

techniques will fail, nor, as argued by the defendants, that they have been "exhausted." *United States v. Spagnuolo,* 549 F.2d 705, 710 (9th Cir. 1977). "[T]he remote possibility that other investigative paths might lead to the desired evidentiary result" does not render an affidavit invalid. *United States v. Baker,* 443 F. Supp. 526, 530 (S.D.N.Y. 1977). Rather, the Government's explanation must be judged in a "practical and commonsense fashion." *United States v. Fury, supra,* 554 F2d at 530 (quoting S. Rep. No. 1097 90th Cong., 2d Sess. (1968), *reprinted in* [1968] U.S. Code Cong. & Ad. News 2112, 2190).

Another consideration in the instant case is the fact (already established by the pen registers) that Loften virtually lives on the telephone. He had two separate numbers and made scores of phone calls daily, often holding persons on one phone while he spoke on the other. Although the phones were in his home, they were obviously his prime means of doing business.

The Court finds in light of the standards set out by the courts that the Government's wiretap application satisfies the requirements of failure or unlikeliness of success of alternative techniques. This case involved a hugh Government investigation of a major narcotics trafficking conspiracy spreading over several states. That mere physical surveillance was inadequate to pierce this conspiracy is self-evident. (Indeed, the defendants argue elsewhere in their memorandum that the surveillance of Loften failed to disclose any evidence of narcotics trafficking.) Moreover, the Government's allegation that its attempts to penetrate the conspiracy through informants was unsuccessful and that an attempt to do so through undercover agents had little likelihood of success does not appear unreasonable. Although Loften had been identified years earlier in the public press as a leading narcotics dealer, the DEA had compiled precious little admissible evidence of his activities. Accordingly, the defendant's motion on this ground is likewise denied.

Minimization

The defendants also claim that the Government failed to comply with the requirement that the electronic surveillance "be conducted in such a way as to minimize the interception of communications not otherwise subject to interception." 18 U.S.C. §2518(5). This requirement, commonly referred to as "minimization," is designed to protect the right of privacy and prevent indiscriminate electronic surveillance. *United States v. Clerkley,* 556 F.2d 709, 715 (4th Cir. 1977), *cert. denied sub nom. Genco v. United States,* 436 U.S. 930 (1978).

Minimization requires law enforcement officials to do all that can be *reasonably* done to minimize the interception of nonpertinent conversations. *United States v. Tortorello,* 480 F.2d 764, 784-85 (2d Cir.), *cert. denied,* 414 U.S. 866 (1973). Since there is no definite rule for determining whether the Government complied with the minimization requirement other than the "reasonableness" standard, the Court must consider the facts and circumstances of each case to determine whether the Government properly minimized the interception. *Scott v. United States,* 436 U.S. 128, 140-41 (1978). The factors to be considered in making this determination include, *inter alia:* the nature of the investigation, the status of the investigation, the length of the phone conversations, the relationship of the conversants, the location of the wiretap, and the ratio of pertinent interceptions to nonpertinent interceptions. *Id.* Thus, the Court noted that nonpertinent interceptions may more reasonably occur in a larger investigation than in a smaller one because the law enforcement officials are less likely to be able to identify the participants. Similarly, it is more reasonable to have nonpertinent interceptions at the beginning of an investigation than at the end or in short conversations rather than lengthy ones. *Id.*

The Government has the burden of making a *prima facie* showing of compliance with the minimization requirement. *United States v. Rizzo,* 491 F.2d 215, 217 n.7 (2d Cir.), *cert. denied,* 416 U.S. 990 (1974). While a hearing is frequently required to determine whether the Government has complied, *see, e.g., United States v. Losing,* 539 F.2d 1174 (8th Cir. 1976); *United States v. Bynum,* 475 F.2d 832 (2d Cir. 1973), *vacated on other grounds,* 417 U.S. 903 (1974), the Second Circuit has ruled that detailed affidavits, supplemented by logs kept during the wiretaps, may be sufficient, especially where the defendant makes no attempt to challenge the Government's showing. *United States v. Cirillo,* 499 F.2d 872, 880 (2d Cir.), *cert. denied,* 419 U.S. 1056 (1974).

The affidavit submitted by the Government in the instant action, supplemented by the five-day reports and daily logs of electronic surveillance, satisfies the Court that the minimization requirement has been met. The monitoring agents were given extensive instructions to insure that the interception of nonpertinent phone calls would be minimized. The agents were instructed to listen to only the beginning of each conversation to determine the nature of the conversation and, in underscored language, were directed to turn off the machines if the conversation was not a "criminal conversation." Moreover, they were given extensive instructions regarding privileged communications and conversations involving a "pattern of innocence," that is, conversations between the named subjects and certain other individuals that, on the basis of several days or a week of surveillance, are known to involve noncriminal matters. While the agents were authorized to "spot-check" non-pertinent conversations, they were instructed to listen only for a few seconds and certainly no longer than two minutes.

That some nonpertinent conversations would be intercepted was inevitable, given the scope of the investiga-

tion, the number of short telephone calls, and the frequent use of coded language. The defendants, however, have offered nothing to suggest that the Government acted unreasonably. Accordingly, the Court concludes that the Government has complied with the statutory requirement of minimization.

Miscellaneous Claims

We deal with the defendants' remaining claims only briefly because they are either totally without merit or because they are more properly decided at another time. We will consider the latter type first.

Defendant Loften claims the attorney-client privilege with respect to his conversations with defendant Socolov. Since this issue has been briefed separately by Socolov's counsel, the Court will addrss this issue when it decides the rest of Socolov's numerous motions.

The defendants also claim that the wiretaps are the "tainted fruit" of an allegedly illegal wiretap of Anthony Todisco, the lead defendant in *United States v. Todisco,* 80 Cr. 563 (S.D.N.Y.). That case is now on appeal in the Second Circuit. *United States v. Todisco,* No. 81-1052. While the defendants contend that the Second Circuit's decision in that case will not control the case at bar, *see United States v. Schmidt,* 604 F.2d 236, 238 (3d Cir. 1979), we decline their invitation to try to predict the decisions of the court of appeals and will await its ruling in the *Todisco* case before considering this claim.

We also have serious doubts about whether the defendants' motion can proceed as currently drafted. All of the defendants except Loften have problems establishing standing to challenge the Todisco wiretap, since only Loften is an "aggrieved person," within the provisions of 18 U.S.C. §2518(10)(a). *See United States v. Fury, supra,* 554 F.2d at 525-26. Moreover, Loften himself cannot necessarily raise

all the issues raised by Todisco, since some issues, for example, minimization, may be raised only by persons with a privacy interest in the premises being wiretapped. *See id.; United States v. Hinton,* 543 F.2d 1002, 1011 n.13 (2d Cir. 1976), *cert. denied,* 429 U.S. 980, 1051, 1066, 430 U.S. 982 (1976, 1977). As we have noted, however, we need not decide these issues now.

The defendants also argue that the electronic surveillance should have been terminated after the first five days because the Government had achieved its authorized objective. *See* 18 U.S.C. §2518(5). This argument is totally without merit. Judge Carter's September 19 order authorized electronic surveillance "until communications are intercepted which reveal the manner in which James Loften and others as yet unknown participated in the . . . offenses and which reveal the identities of their confederates, their places of operation and the nature of the conspiracy involved therein. . . ." The contention that this objective was achieved during the first five days is simply unsupported by the facts. Additional seizures and conspirators came to light from the taps after the first five days.

Defendant Socolov's separate motions include the argument that the DEA agents violated their own internal instructions prohibiting the interception of privileged attorney-client communications. It is well settled that the failure of government employees to follow an internal government directive or policy does not create enforceable rights for a defendant. *See, e.g., United States v. Caceres,* 440 U.S. 741 (1979); *United States v. Cambindo Valencia,* 609 F.2d 603, 636 n.28 (2d Cir. 1979), *cert. denied sub nom. Prado v. United States,* 446 U.S. 940 (1980). Moreover, it does not appear that there was any violation of the Government's internal instructions here. The written instructions given to the monitoring agents were amended by oral directives from the Assistant United

States Attorney in charge of the investigation. The Assistant reached the conclusion that certain conversations were not privileged. His amended instructions authorized the subsequent interception on the basis of his belief that the conversations concerned business advice rather than legal advice and, therefore, were not privileged. (This topic is also the subject of a separate Socolov motion.) Consequently, the claim that government employees failed to follow an internal government directive does not warrant suppressing the wiretap evidence.

Finally, the defendants move to suppress the tapes on the ground that Philip Heymann, the Assistant Attorney General for the Criminal Division of the Department of Justice, who authorized the wiretap application, did not have the authority to do so, because: (1) the order giving the Assistant Attorney General for the Criminal Division this responsibility did not name Heymann specifically; and (2) the order had no effect because it was issued by Griffin Bell, the former Attorney General, rather than Benjamin Civiletti, the Attorney General at the time of the authorizations in this case. This claim is likewise without merit.

The defendants' claim regarding the omission of the name of the official holding the position of "Assistant Attorney General in charge of the Criminal Division" was considered and rejected by the First Circuit in *United States v. Pellicci,* 504 F.2d 1106, 1107 (1st Cir. 1974), *cert. denied,* 419 U.S. 1122 (1975). *See United States v. Votteller,* 544 F.2d 1355, 1358-59 (6th Cir. 1976). The claim regarding the issuance of the authorization order by Attorney General Bell rather than Attorney General Civiletti was rejected in *United States v. Mallory,* 507 F.Supp. 99 (D. Md. 1981). This Court considers that these cases adequately dispose of these issues.

Accordingly, for the reasons set out above, the motion to suppress the results of the electronic surveillance is

denied, except to the extent that consideration of issues raised by defendant Socolov's motions has been postponed.

SO ORDERED.

Dated: New York, N.Y.,
May 22, 1981

s/ Gerard L. Goettel
GERARD L. GOETTEL
U.S.D.J.

FOOTNOTES

1. One defendant, James Jones, has not been arrested or arraigned.

2. RICO is an acronym for the statute entitled Racketeer Influenced and Corrupt Organizations, Title IX of the Organized Crime Control Act of 1970, Pub. L. No. 91-452, 84 Stat. 922 (1970).

3. The last named defendant, Lee Stewart, is apparently not heard on any of the wiretap tapes.

4. In support of the joint motion, defendant Socolov argues extensively on attorney-client privilege.

5. The conversations, as is not uncommon in narcotics transactions, were rather veiled and seemed to be in code. It takes some translation to interpret these conversations as specifically involving drugs.

6. The purpose of listing persons called *after* Todisco's arrest was to establish that the elimination of a source of supply had not put Loften out of the narcotics business.

7. While it does not appear that a hearing was necessary, *see Franks v. Delaware,* 438 U.S. 154, 171-72 (1978), the Court chose to conduct one in light of the Second Circuit's recent comment that hearings might be necessary "to determine whether the perjury infects the proper administration of justice." *United States v. Barnes,* 604 F.2d 121, 153 n.17 (2d Cir. 1979), *cert. denied,* 446 U.S. 907 (1980).

8. Establishing that certain of the affiant's statements were made with "reckless disregard for the truth" does not in and of itself demand the suppression of the wiretap evidence. Rather, the evidence must be suppressed only if the affidavit is insufficient to establish probable cause once the false material has been set aside. *Franks v. Delaware, supra,* 438 U.S. at 156. *But see United States v. Barnes,* 604 F.2d 121, 153 n.17 (2d Cir. 1979), *cert. dneied,* 446 U.S. 907 (1980).

9. Both Chin and Harris were called after the date of the Todisco arrest.

10. The defendants seem to be making two separate claims regarding alternative investigative techniques. The first concerns the veracity of the affidavit and is considered at this juncture. The other concerns the statutory requirement that normal investigative procedures be attempted before a wiretap may be authorized. 18 U.S.C. §§2518(1)(c), 2518(3)(c). That aspect of the defendants' claim is considered in the section labeled "Availability of Alternative Investigative Techniques," *infra.*

11. In some instances, pen registers can be set up so that a tape is produced automatically indicating the numbers called. In the Westchester County Police investigation, however, it was necessary to monitor the machinery and to take down by hand the numbers being dialed. This, needless to say, was a very manpower-consuming operation.

12. That there was a twenty-four-hour gap between the expiration of the September 19 order and the issuance of the October 10 order does not prevent the latter from being treated as an extension. *See United States v. Scafidi, supra* (order issued after three-day delay treated as an extension); *United States v. Principie,* 531 F.2d 1132, 1142 n.14 (2d Cir. 1976) (order issued four days after expiration of original order regarded as an extension).

13. The Government appears to argue, in the alternative, that there was *no* delay because it could have continued the monitoring after Loften had been arrested since all of the authorized objectives had not been obtained. *See* text *infra.* We need not reach this issue, however, because we conclude that the seven-day interval between the October 31 termination of

monitoring and the November 7 sealing has been adequately explained.

14. While section 2518(8)(a) provides for the tapes to be sealed under the direction of the judge who authorized the wiretap, the tapes may be sealed by a judge other than the issuing judge when the issuing judge is absent or unavailable. *United States v. Vazquez, supra,* 605 F.2d at 1280 n.25; *United States v. Poeta,* 455 F.2d 117, 122 (2d Cir.), *cert. denied,* 406 U.S. 948 (1972).

15. It is ironic that the defendants complain about boilerplate allegations or complain that the application used by the Government was modeled after a similar investigation, since many of the papers submitted by the defendants are obviously "canned briefs." Indeed, on at least one occasion, defense counsel even failed to make the appropriate name substitutions and submitted a brief with names of people totally unrelated to the case at bar.

APPENDIX C—OPINION OF SECOND CIRCUIT

UNITED STATES COURT OF APPEALS
FOR THE
SECOND CIRCUIT

At a stated Term of the United States Court of Appeals for the Second Circuit, held at the United States Courthouse in the City of New York, on the eighth day of March one thousand nine hundred and eighty-two.

Present: HONORABLE WILFRED FEINBERG,
Chief Judge,
HONORABLE IRVING R. KAUFMAN,
HONORABLE WALTER R. MANSFIELD,
Circuit Judges,

UNITED STATES OF AMERICA,
Appellee,

v.

JAMES LOFTEN, ROY HARRIS, HENRY MORGAN, JR., PAUL CHIN, PATRICIA E. GAINER, FURMAN STARR, and ROBERT GOODWIN,
Defendants-Appellants.

81-1386, 81-1387, 81-1388, 81-1389, 81-1390, 81-1391, 81-1424, 81-1386-1391, 81-1424

FILED
MAR 8 1982
A. DANIEL FUSARO, CLERK

N.B. Since this statement does not constitute a formal opinion of this court and is not uniformly available to all parties, it shall not be reported, cited or otherwise used in unrelated cases before this or any other court.

Appeal from the United States District Court for the Southern District of New York.

This cause came on to be heard on the transcript of record from the United States District Court for the Southern District of New York, and was argued by counsel.

ON CONSIDERATION WHEREOF, it is now hereby ordered, adjudged, and decreed that the judgments of said District Court be and hereby are affirmed.

1. Appellants contend that Judge Goettel improperly refused, after a full hearing, to suppress wiretap evidence. They claim, *inter alia,* that the wiretap application failed to establish probable cause to believe the evidence of narcotics violations would be uncovered through the wiretap. For example, they assert that the affidavit of Agent Joseph Corcoran accompanying the application inaccurately reported that after Todisco's arrest, appellant Loften placed telephone calls to twelve narcotics traffickers.

2. The Government conceded this error and asked Judge Goettel not to consider this portion of the affidavit in determining probable cause. Agent Sandler, who prepared the challenged list in a few hours from a list of 300 telephone numbers, was thoroughly questioned at the suppression hearing and was available for exhaustive cross-examination. At the close of testimony, the district court found that Sandler acted neither intentionally nor from an improper motive, but indicated he had not included this portion of the affidavit in his determination that probable cause existed. Indeed, had this list been considered, suppression would not have been warranted on

this basis because the inaccuracies were not the product of deliberate falsehood or reckless disregard for the truth. *See Franks v. Delaware,* 438 U.S. 154, 171-72 (1978). We do not, however, condone preparing an affidavit in the slipshod fashion exhibited in this instance.

3. The remainder of the affidavit was clearly sufficient to establish probable cause. Probable cause is a reasonable foundation for belief in a suspect's guilt; proof of guilt beyond a reasonable doubt is not required. *United States v. Webb,* 623 F.2d 758, 761 (2d Cir. 1980). Furthermore, affidavits in support of a search warrant must be read together. *See United States v. Harris,* 403 U.S. 573 (1971); *United States v. Ventresca,* 380 U.S. 102 (1965); *United States v. Kahan,* 572 F.2d 923 (2d Cir.), *cert. denied,* 439 U.S. 833 (1978).

4. Without the list of twelve narcotics traffickers, the affidavit and its supporting attachments established that: two witnesses, Reynolds and Brown, testified under oath during the prior Todisco trial describing their knowledge of Loften's involvement in large-scale narcotics trade between 1969 and 1976; Loften was reputed to be a major narcotics operator as shown by references to police files and his four arrests on drug charges, resulting in one conviction; a reliable informant reported that in 1980 Loften was trading in huge quantities of heroin; during August Loften and Todisco, one of Loften's heroin suppliers, had a series of thinly disguised telephone conversations about heroin transactions; Loften made approximately forty telephone calls a day to hundreds of different telephone numbers throughout the country. These facts surely demonstrated a "sufficiently suspicious set of overlapping facts" to establish probable cause that Loften engaged in narcotics operations. *United States v. Manafzadeh,* 592 F.2d 81, 90 (2d Cir. 1979). *See United States v. Perry,* 643 F.2d 38 (2d Cir.), *cert. denied,* 102 S.Ct. 138 (1981).

5. Appellants claim that the proof at trial established the existence of two separate conspiracies, one in operation from 1969-1975 and the other lasting from June through October 1980. Whether the proof has established single or multiple conspiracies is an issue of fact "singularly well-suited to resolution by the jury." *United States v. McGrath,* 613 F.2d 361, 367 (2d Cir. 1979), *cert. denied,* 446 U.S. 967 (1980). *See United States v. Alessi,* 638 F.2d 466, 472 (2d Cir. 1980). The evidence amply supports the jury's finding of a single narcotics conspiracy. There were massive cash purchases by Loften in the 1976-1978 period and in 1980 despite no discernible income. A telephone conversation was introduced in which Loften and co-appellant Morgan referred to difficulties in controlling the price of heroin over the last ten to fifteen years. Also, "stash pads" leased in 1976 and 1978 were still in use in 1980. Other bits and pieces showed the continuing nature of this conspiracy. The evidence suggests drug traffic continued over the years and did not cease in 1975 and then resume in 1980. Accordingly, the evidence supporting the jury's finding that the Government proved the existence of the conspiracy charged in Count One was ample. *See United States v. Murray,* 618 F.2d 892, 902 (2d Cir. 1980).

6. Appellants challenge the jury charge on multiple conspiracies. For example, they now contend that Judge Goettel failed to charge that the five-year statute of limitations applied. By not objecting to the absence of such an instruction at trial, however, appellants have waived their claim. *See United States v. Grammatikos,* 633 F.2d 1013 (2d Cir. 1980).

7. Loften claims that the district court should have instructed the jury, on the continuing criminal enterprise count, 21 U.S.C. §848, that a "series" of violations meant three or more. Loften, however, did not object to the charge at trial. We will not consider this belated claim on appeal. *See United States v. Grammatikos, supra.*

Moreover, courts need not define such common terms for the jury, *see United States v. Marino,* 639 F.2d 882 (2d Cir.), *cert. denied,* 102 S.Ct. 115 (1981), and the charge was substantially identical to the instructions approved by this Court in cases involving an alleged violation of a continuing criminal enterprise count. *See United States v. Sperling,* 506 F.2d 1323 (2d Cir. 1974), *cert. denied,* 420 U.S. 962 (1975).

8. Chin asserts that Judge Goettel abused his discretion in denying his motion for severance. While some of the evidence admitted at trial did not concern Chin directly, a co-conspirator's more limited role in the conspiracy doe snot alone justify a separate trial. *United States v. Aloi,* 511 F.2d 585 (2d Cir.), *cert. denied,* 423 U.S. 1015 (1975); *United States v. Vega,* 458 F.2d 1234 (2d Cir. 1972), *cert. denied,* 410 U.S. 982 (1973). Substantial evidence implicated Chin in the conspiracy. In addition to Loften's many conversations with Chin, Loften spoke to Morgan, Harris, Goodwin, and Gainer about Chin and the Hong Kong heroin transactions on numerous occasions. Moreover, Chin's acquittal on Count 8, charging unlawful possession of heroin, indicates that the jury was discerning and that he did not suffer "substantial prejudice" from the joint trial. *See United States v. Stirling,* 571 F.2d 708, 733 (2d Cir.), *cert. denied,* 439 U.S. 824 (1978).

9. Morgan contends that the evidence at trial was insufficient to support his conviction because his conversations with Loften were "highly biased" misinterpretations and because Loften's statements to Morgan and other co-conspirators were "admitted without a prior independent showing of a conspiracy." Loften's statements constituted independent circumstantial proof of the existence of a conspiracy. They gave meaning to the "code" or cloaked language used among the co-conspirators and to the repeated trips Goodwin and Starr made to Detroit. They

established Morgan's own knowledge of Loften's activities. *See, e.g., United States v. Lubrano,* 529 F.2d 633 (2d Cir. 1975), *cert. denied,* 429 U.S. 818 (1976); *United Sttes v. Sisca,* 503 F.2d 1337 (2d Cir.), *cert. denied,* 419 U.S. 878 (1974). Thus, Loften's statements were properly admitted against Morgan as declarations of a co-conspirator. Federal Rules of Evidence, Rule 801(d)(2)(E); *United States v. Cambindo-Valencia,* 609 F.2d 603 (2d Cir. 1979), *cert. denied,* 446 U.S. 940 (1980).

10. Appellants raise a multitude of other claims in their briefs. Three illustrations will suffice. Appellants challenged Judge Goettel's denial of their motions to suppress the wiretap evidence because the tapes were allegedly not sealed "[i]mmediately" in accordance with the requirements of 18 U.S.C. §2518(8)(a). Judge Goettel properly refused to suppress the evidence. The delay was brief. *See United States v. McGrath,* 622 F.2d 36, 42-43 (2d Cir. 1980). Moreover, the delay was reasonable since the extremely large quantity of tapes made processing time-consuming. In addition, the tapes were stored in a DEA vault that could not be opened over the weekend. The Government also seeks to explain its delay by claiming that it was partially caused by the desire to have the tapes sealed by the same judge who issued the warrant. While we believe that the totality of the circumstances amounts to a reasonable explanation for the seven-day delay, *id.*, we wish to reiterate a point we made in *United States v. Vazquez,* 605 F.2d 1269, 1280 & n.25 (2d Cir.), *cert. denied,* 444 U.S. 981 (1979): the government is under a duty to have the tapes sealed promptly; it is under no duty whatsoever to have them sealed by the issuing judge.

11. Loften claims that the district court improperly ruled that his conversations with attorneys Socolov and Geller did not fall within the ambit of the attorney-client privilege. Loften did not meet his burden of establishing that the advice sought from Socolov and Geller concerned

legal matters rather than business investments. *See United States v. Demauro,* 581 F.2d 50, 55 n.4 (2d Cir. 1978). In addition, Loften waived any privilege of confidentiality by relating the conversations with Socolov and Geller to other persons, including Gainer and Harris. *See United States v. Stern,* 511 F.2d 1364, 367 (2d Cir.), *cert. denied,* 423 U.S. 829 (1975).

12. Starr contends that the district court abused its discretion in denying his motion pursuant to the Criminal Justice Act, 18 U.S.C. §3006A(e)(1), for funds to purchase a copy of all the wiretap tapes. A full set of the tapes was available at the U.S. Attorney's office for defense counsel's use. Counsel for Loften and Gainer had a complete set of the tapes; the Government provided a free copy of every recording that Starr's counsel specifically requested. Accordingly, Judge Goettel did not abuse his discretion in denying Starr's request because it was not "reasonably necessary." *See United States v. Oliver,* 626 F.2d 254 (2d Cir. 1980).

13. All appellants' other claims are equally without merit.

s/ Wilfred Feinberg
WILFRED FEINBERG, Chief Judge.

s/ Irving R. Kaufman
IRVING R. KAUFMAN

s/ Walter R. Mansfield
WALTER R. MANSFIELD,
Circuit Judges.

APPENDIX D—APPLICATION FOR WIRE TAP ORDER

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

IN THE MATTER OF THE APPLICATION OF THE UNITED STATES OF AMERICA FOR AN ORDER AUTHORIZING THE INTERCEPTION OF WIRE COMMUNICATIONS

APPLICATION FOR ORDER AUTHORIZING THE INTERCEPTION OF WIRE COMMUNICATIONS

STATE OF NEW YORK)
COUNTY OF NEW YORK : ss.:
SOUTHERN DISTRICT OF NEW YORK)

PHILIP Le B. DOUGLAS, an Assistant United States Attorney for the Southern District of New York, being duly sworn, deposes and says:

1. This application seeks an order authorizing the interception of wire communications involving telephone facilities (914) 576-2376 and (914) 576-2377. This application has been submitted only after detailed discussion concerning the necessity for such an application with various Special Agents of the Drug Enforcement Administration, United States Department of Justice.

2. I am an "investigative or law enforcement officer of the United States" within the meaning of Section 2510(7) of Title 18, United States Code; that is, I am an attorney authorized by law to prosecute or participate in the prosecution of offenses enumerated in Section 2516 of Title 18, United States Code.

3. Pursuant to the powers conferred on him by special designation of the Attorney General of the United States, pursuant to Section 2516, Title 18, United States Code, the Assistant Attorney General for the Criminal Division, the Honorable Philip B. Heymann, has authorized this application for an order authorizing the interception of wire communications. Attached to this application as Exhibit "A" is a copy of the memorandum of authorization.

4. This application seeks authorization to intercept communications of JAMES LOFTEN, a/k/a "Jay", a/k/a "Jimmy", a/k/a "the painter", and others as yet unknown concerning offenses enumerated in Section 2516 of Title 18, United States Code, that is, the importation and distribution of narcotic drug controlled substances the possession of such substances with intent to distribute, the use of wire facilities to aid in distributing and possessing with intent to distribute narcotic drug controlled substances, a conspiracy to import and distribute and to possess with intent to distribute such substances, and engaging in a continuing criminal enterprise of buying, selling and otherwise dealing in narcotic drug controlled substances in which five or more persons are participating and from which substantial income and resources are being obtained, in violation of Title 21, United States Code, Sections 841, 843(b), 846, 848, 952, 960 and 963; as well as receiving income from a pattern of racketeering activity, in violation of Title 18, United States Code, Sections 1962 and 1963, which have been and are being committed by those individuals above-named and others as yet unknown.

5. As part of a related investigation of ANTHONY TODISCO, (hereinafter "TODISCO"), on August 7, 1980 and August 26, 1980 respectively, United States District Judges Jack B. Weinstein and Eugene Nickerson, of the Eastern District of New York, ordered interception

of conversations involving TODISCO's telephone (212) 939-1858). (See attachments "A" and "B").

6. I have discussed all of the circumstances of the above offenses with Special Agent Joseph J. Corcoran of the New York Office of the Drug Enforcement Administration who, along with other Special Agents, has directed and conducted the investigation herein, and I have examined the affidavit of Special Agent Corcoran (attached to this application as Exhibit "B" and incorporated by reference herein) which alleges the facts therein in order to show that:

(a) There is probable cause to believe that JAMES LOFTEN, a/k/a "Jay", a/k/a "Jimmy", a/k/a "the painter", and others as yet unknown have been and are committing the following offenses: the importation and distribution of narcotic drug controlled substances, the possession of such substances with intent to distribute, the use of wire facilities to aid in distributing and possessing with intent to distribute narcotic drug controlled substances, a conspiracy to import and distribute and to possess with intent to distribute those substances, and engaging in a continuing criminal enterprise of buying, selling and otherwise dealing in narcotic drug controlled substances in which five or more persons are participating, and from which substantial income and resources are being obtained, in violation of Sections 841, 843(b), 846, 848, 952, 960 and 963, Title 21, United States Code; as well as receiving income from a pattern of racketeering activity, in violation of Title 18, United States Code, Sections 1962 and 1963.

(b) There is probable cause to believe that particular wire communications of JAMES LOFTEN, a/k/a "Jay", a/k/a "Jimmy", a/k/a "the painter", and others as yet unknown concerning these offenses will be obtained through the interception of wire communications, the authorization for which is herewith applied for. In par-

ticular, these wire communications will concern, *inter alia,* the importation and distribution of narcotic drug controlled substances, the proceeds of such importation and distribution, the locations at which the narcotics are stored, the means and manner of delivery of the narcotics, the identity of the participants in the conspiracy and enterprise, and the precise nature and scope of the illegal activity. In addition, the communications are expected to constitute admissible evidence of the commission of the offenses.

(c) There is probable cause to believe that telephone numbers (914) 576-2376 and (914) 576-2377 located at a residence at 31 Sheldrake Land, New Rochelle, New York, and subscribed to by JAMES LOFTEN, 31 Sheldrake Lane New Rochelle, New York, have been and are being used by JAMES LOFTEN, a/k/a "Jay", a/k/a "Jimmy", a/k/a "the painter", and others as yet unknown in connection with the commission of the above-described offenses.

(d) Normal investigative procedures have either been tried and failed and reasonably appear to be unlikely to succeed if continued or reasonably appear unlikely to succeed if tried.

7. Except for the applications made to Judges Weinstein and Nickerson for an order for interception of wire communications involving TODISCO's telephone facility at (212) 939-1858, no previous applications are known to have been made to any judge for authorization to intercept wire communications involving any of the persons or premises specified herein.

WHEREFORE, I believe that probable cause exists to believe that JAMES LOFTEN, a/k/a "Jay", a/k/a "Jimmy", a/k/a "the painter," and others as yet unknown, have used and are using telephone numbers (914) 576-2376 and (914) 576-2377 located at a residence at 31 Sheldrake Lane, New Rochelle New York, subscribed

to by JAMES LOFTEN, 31 Sheldrake Lane, New Rochelle, New York, in connection with the commission of the above-described offenses and that wire communications of those named persons and others as yet unknown concerning these offenses will be intercepted, and that normal investigative procedures appear unlikely to succeed.

On the basis of the allegations contained in this application and in the affidavit of Special Agent Corcoran attached hereto, I request that this Court issue an Order, pursuant to the power conferred upon it by Section 2518 of Title 18, United States Code:

a) authorizing the Drug Enforcement Administration of the United States Department of Justice to intercept wire communications, to and from the above-described telephone until communications are intercepted which reveal the manner in which JAMES LOFTEN, a/k/a "Jay", a/k/a "Jimmy", a/k/a "the painter", and others as yet unknown participate in the offenses alleged above and which reveal the identities of their confederates, their places of operation and the nature and details of the conspiracy involved or for a period of twenty (20) days from the date of that Order, whichever is earlier;

b) authorizing law enforcement officers of the Westchester County Police Department and employees of local prosecutor's offices (who are authorized by law to investigate, make arrests, or prosecute offenses enumerated in ¶4) to assist the Drug Enforcement Administration in conducting the electronic surveillance and investigation;

c) authorizing disclosure of intercepted communications involving telephone facililities (914) 576-2376 and (914) 576-2377 to law enforcement officers of the Westchester County Police Department and employees of local prosecutors offices who are able to make use of information in the course of their official duties, to the ex-

tent that such disclosure is appropriate to the proper performance of the official duties of those officers;

d) prohibiting disclosure of intercepted communications involving telephone facilities (914) 576-2376 and (914) 576-2377 by Westchester County Police law enforcement officers and employees of local prosecutor's offices to other Federal, State and local government agencies.

It is further requested that this Court issue an Order pursuant to Section 2518(4) of Title 18, United States Code, directing that the New York Telephone Company, a communication common carrier as defined in Section 2510(10) of Title 18, United States Code, shall furnish the applicant forthwith with all information, facilities and technical assistance necessary to accomplish the interception unobtrusively and with a minimum of interference with the services that such carrier is according the person whose communications are to be intercepted, the furnishing of such facilities or technical assistance by the New York Telephone Company to be compensated for by the applicant at the prevailing rates.

It is further requested that to avoid prejudice to this criminal investigation, the said communication common carrier, its agents, and employees be ordered not to disclose or cause the disclosure of the Order herein applied for or of the interception which it authorizes to any person other than those of its agents and employees who require said information to accomplish the interceptions of communications hereby ordered. It is requested that, in particular, said carriers, its agents and employees be ordered not to make such disclosure to a telephone subscriber, any potential interceptee, or participant in the offenses herein named.

PHILIP Le B. DOUGLAS
Assistant United States Attorney
Southern District of New York

Subscribed to and Sworn to
before me this day of
September, 1980

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

IN THE MATTER OF THE APPLICATION OF THE UNITED STATES OF AMERICA FOR AN ORDER AUTHORIZING THE INTERCEPTION OF WIRE COMMUNICATIONS

STATE OF NEW YORK)
COUNTY OF NEW YORK : ss.:
SOUTHERN DISTRICT OF NEW YORK)

JOSEPH J. CORCORAN, Special Agent, Drug Enforcement Administration, New York, New York, being duly sworn, deposes and says:

1. I am an "investigative or law enforcement officer . . . of the United States" within the meaning of Section 2510(7) of Title 18, United States Code, that is, an officer of the United States who is empowered by the law to conduct investigations and to make arrests for offenses enumerated in Section 2516 of Title 18, United States Code.

2. I make this affidavit in support of an application which seeks authorization to intercept wire communications involving the offenses of the importation and distribution of narcotic drug controlled substances, the possession of such substances with intent to distribute, the use of wire facilities to aid in distributing and possessing with intent to distribute narcotic drug controlled substances, a conspiracy to import and distribute and to possess with intent to distribute such substances, and engaging in a continuing criminal enterprise of buying, selling and otherwise dealing in narcotic drug controlled substances in which five or more persons are participating,

and from which substantial income and resources are being obtained, in violation of Sections 841, 843(b), 846, 848, 952, 960 and 963, Title 21, United States Code; as well as receiving income from a pattern of racketeering activity, in violation of Title 18, United States Code, Sections 1962 and 1963, which have been and are being committed by JAMES LOFTEN, a/k/a "Jay", a/k/a "Jimmy", a/k/a "the painter", and others as yet unknown.

3. I have participated in the investigation of the above offenses and as a result of my present participation in this investigation and of reports, oral and written, made to me by other agents of the Drug Enforcement Administration, I am familiar with all the circumstances of this investigation. On the basis of this familiarity I allege the facts contained in the numbered paragraphs below to show that:

(a) There is probable cause to believe that JAMES LOFTEN, a/k/a "Jay", a/k/a "Jimmy", a/k/a "the painter", and others as yet unknown have been and are committing the following offenses: importation and distribution of narcotic drug controlled substances, possession of such substances with intent to distribute, use of wire facilities to aid in distributing and possessing with intent to distribute narcotic drug controlled substances, conspiracy to import and distribute and to possess with intent to distribute those substances, and engaging in a continuing criminal enterprise of buying, selling, and otherwise dealing in narcotic drug controlled substances in which five or more persons are participating and from which substantial income and resources are being obtained, in violation of Sections 841, 843(b), 846, 848, 952, 960 and 963, Title 21, United States Code; as well as receiving income from a pattern of racketeering activity, in violation of Title 18, United States Code, Sections 1962 and 1963;

(b) There is probable cause to believe that particular wire communications of JAMES LOFTEN, a/k/a "Jay",

a/k/a "Jimmy", a/k/a "the painter", and others as yet unknown concerning these offenses will be obtained through interception—authorization for which is herein applied for—of wire communications emanating from telephone numbers (914) 576-2376 and (914) 576-2377 which New York Telephone Company has verified are subscribed to by "Jimmy LOFTEN" and are located at 31 Sheldrake Lane, New Rochelle, New York, and which have been and are being utilized by those persons in the commission of those offenses;

(c) There is probable cause to believe that evidence of these offenses, including evidence of the identities and roles of other participants in the illegal narcotics activities, the manner in which those activities are conducted, other locations utilized in furtherance of those activities, and the distribution of the contraband and monies utilized in and obtained by the activities, will be obtained through the interception of the wire communications, the authorization for which is herein applied for;

(d) Normal investigative procedures have been tried and failed or appear unlikely to succeed if tried. These investigative procedures will be detailed further herein;

(e) Except for orders of United States District Judges Jack B. Weinstein and Eugene Nickerson on August 7, 1980 and August 26, 1980 respectively, authorizing the interception of wire communications involving ANTHONY TODISCO, a/k/a "Lefty," and telephone (212) 939-1858, no previous applications are known to have been made to any judge for authorization to intercept wire communications involving any of the persons or premises specified herein. (See attachments "A" and "B").

BACKGROUND—JIMMY LOFTEN

4. The investigation and prosecution of the case *United States v. Moten,* 76 Cr. 324, concerned a major national and international narcotics organization whose

members were responsible, for at least the period from 1968 to 1975, for the distribution of kilograms of heroin and cocaine throughout major metropolitan centers, including New York, Miami, Washington, D.C. and Chicago. Although JIMMY LOFTEN was not a defendant, there was trial testimony in that case by two Government witnesses regarding JIMMY LOFTEN's narcotics distribution operation. Helen Ann Reynolds, a cooperating co-defendant in that case, testified that she was a friend of JIMMY LOFTEN and that she had been intermittently employed in his Harlem heroin trafficking operation from 1969 to 1976. Reynolds testified further that LOFTEN employed her to cut heroin for distribution as well as to occassionally distribute heroin. Moreover, Reynolds testified that, during March, 1973, she personally delivered to LOFTEN 10 kilograms of cocaine which he had purchased for approximately $68,000. Another cooperating defendant, at the *Moten* trial, John T. Brown, testified that, as part of the LOFTEN organization, he had sold approximately 5 kilograms of cocaine during the period December 1972 to approximately February 1973.

On December 9, 1975, the *New York Times* (p. 47) published a lengthy article concerning the thirteen biggest narcotics dealers in New York City. JIMMY LOFTEN (whose name was misspelled as Lofton) was identified as a major black heroin trafficker on a level with such others as Robert Stepeny, Leroy "Nicky" Barnes and Steven Monsanto. With respect to LOFTEN, the article, in part, stated:

> *JAMES LOFTEN*
>
> The 29-year old Mr. Loften lives in New Rochelle, but the police describe him as a "major supplier of heroin" in the Bronx and Harlem. He, too, has an organization that imports, packages and distribute heroin, according to police intelligence files.

Mr. Loften has described himself as being in the real-estate business. Police records indicate that he is the owner of a dry cleaning store on Manhattan Avenue. Police records show that he has been arrested at least three times and he has served one prison sentence of less than a year. He has never been arrested on a narcotics trafficking charge.

One of Mr. Loften's hobbies is sailing. He has a 42-foot boat moored at the New Rochelle Yacht Club.

With respect to legal sources of income for LOFTEN, the Government has verified information that he is a part-owner of a hardware store in New York City and that his wife operates a boutique in New Rochelle, New York.

LOFTEN's prior criminal record reveals that, from 1964 to 1966, LOFTEN was arrested five times in New York City. Four of those arrests were on narcotics charges. LOFTEN has a 1975 Southern District of New York conviction for failing to file federal income tax returns for which he was sentenced to two years probation.

BACKGROUND—INVESTIGATION

5. From on or about April 29, 1980 to the present, I hae been conducting an investigation of a heroin trafficking operation which appears to be importing massive quantities of heroin from Italy and distributing it in New York and Maryland. Some of the individuals whose activities were investigated are: ANTHONY TODISCO, a/k/a "Lefty", ANTHONY VALLONE, a/k/a "Tooty", HECTOR TORRES, a/k/a "Picaro", a/k/a "Woody", a/k/a "Swartza", DAVID D'ANGELO, LUIS ACOSTA, a/k/a "Louis Molina", a/k/a "Angel," and JIMMY LOFTEN.

From April 29, 1980 to August 7, 1980 this investigation was conducted primarily through meetings and

telephone calls between DEA undercover agent William Silvestri and targets ACOSTA and TORRES. (For details of that phase of the investigation see attachment "A—Affidavit"). VALLONE was observed in the vicinity of several heroin sales to Agent Silvestri by ACOSTA and TORRES, who made statements indicating that they were receiving the heroin from others. At the time of several of these transactions, VALLONE was seen driving to the residence of TODISCO, his co-officer in T.C.T. Trucking Corp. (hereinafter "TCT"). (VALLONE and TODISCO have been previously convicted of federal narcotics violations). Moreover, during this period, TODISCO, made many calls to other known narcotics traffickers, including a number of calls to JIMMY LOFTEN. On August 7, 1980, Chief Judge Jack B. Weinstein, of the Eastern District of New York, executed an order authorizing interception of telephone communications involving TODISCO's telephone (212) 939-1858). (See Attachment "A").

It appears from conversations intercepted on TODISCO's telephone pursuant to that order (and J dge Nickerson's August 26, 1980 extension of it) that TODISCO was involved in a major heroin importation and distribution operation along with others identified and presently unidentified. (See Attachment "B-Affidavit"). It appears that several of the individuals who received heroin from TODISCO were themselves major distributors. One such individual, JIMMY LOFTEN, appears to have a large-scale operation which distributes the heroin he receives from TODISCO and others who are at present unknown.

On September 3, 1980, the above-described investigation resulted in the arrest of TODISCO, VALLONE, TORRES, ACOSTA and SAL SFERRAZZA, among others. As the complaint filed in connection with those arrests indicates (see Attachment "C"), ACOSTA and

TORRES sold heroin to a DEA agent acting in an undercover capacity on a number of occasions. Other defendants named in the complaint, including TODISCO, could be linked to those transactions.

At the time of TODISCO's arrest at 610 Waring Avenue, Bronx, New York—one of the locations used by his organization to store heroin—drug paraphernalia, weapons and five pounds of highly pure heroin were seized. VALLONE was arrested in the Bronx as he was about to deliver one kilogram of heroin to ACOSTA and TORRES. TORRES and ACOSTA were themselves arrested in the vicinity of 30 East Kingsbridge Road in the Bronx, New York and seized from TORRES was a weapon and an electronic surveillance detector.

CURRENT INVESTIGATION

6. Analysis of toll records and Westchester County Police pen register records regarding LOFTEN's telephones (914) 576-2376 and (914) 576-2377, revealed that, before electronic surveillance of TODISCO's telephone commenced on August 7, 1980, LOFTEN made the following calls to TODISCO during the following periods:

(914) 576-2376—(per toll records and LUD cards for April 7, 1980 through June 20, 1980): 4/7; 5/10; 5/19; 6/5; 6/18; (per pen register tapes for 8 AM to Midnight, Monday through Friday, for July 16, 1980 through August 18, 1980): 8/7; 8/8 (2 calls); 8/11; 8/12; 8/18.

(914) 576-2377—(per toll records and LUD cards for 8 AM to Midnight, Monday through Friday, for April 7, 1980 through June 20, 1980): 5/5; 5/6 (2 calls); 5/9; 5/24; (per pen register tapes for July 16, 1980 through August 18, 1980): 8/6.

I have also learned from Westchester County Police Officer Ted Rau that, on weekdays from April through mid-August, during the period 8 AM to midnight, LOFTEN made an average of approximately 25 calls daily from telephone (914) 576-2376 and 15 outgoing calls daily from telephone (914) 576-2377. An analysis of LOFTEN's calls during the above period reveals calls from LOFTEN's two numbers to over 300 different numbers throughout the United States.

At approximately 3:15 PM on August 7, 1980, while electronic surveillance equipment was being installed, DEA Agent Robert Joura, who was assisting in the installation of the equipment, overheard an unrecorded call from LOFTEN to TODISCO in which LOFTEN asked TODISCO if he had pictures of the "chalk". (There is presently no evidence at all that TODISCO or LOFTEN are involved in any chalk dealings in the ordinary sense of the term.) An analysis of pen register tapes revealed that this call was made from LOFTEN's telephone (914) 576-2376. At approximately 6:37 PM that same day, after the equipment became operational, TODISCO called LOFTEN's house and left a message that TODISCO would not be able to meet with LOFTEN at 8:30 PM and that TODISCO would call again later. TODISCO called LOFTEN again at approximately 8:50 PM and, after learning that LOFTEN was not at home, left a message that he would call LOFTEN.

On August 8, 1980, at approximately 7:59 AM, while the surveillance equipment was malfunctioning, DEA Agent John E. Gratland overheard a call from TODISCO to LOFTEN during which they arranged to meet at 2 PM. LOFTEN told TODISCO to meet him in the "opposite place" and that he (LOFTEN) would be with the "cheese". (Neither TODISCO nor LOFTEN were ever again overheard mentioning the previously-referred-to "chalk" transaction). Later that day, at approximately

1:17 PM, TODISCO called LOFTEN and postponed their arranged meeting until 4 PM. During that conversation, TODISCO said in substance that he was delaying the meeting because VALLONE was coming to TODISCO's house and that, although he wanted to "dump" VALLONE as soon as possible, he could not tell VALLONE to leave because he (TODISCO) had to meet LOFTEN. It was clear from the conversation that LOFTEN knew VALLONE. TODISCO and LOFTEN then agreed to meet at 4 PM at "that place". Regarding "that place", LOFTEN stated, "yeah, that's nice there because we don't stop there too much."

Later that day, at approximately 8 PM, LOFTEN called TODISCO and said he had not been able to meet TODISCO because his "Roy Rogers" (Rolls Royce) had broken down. When LOFTEN told TODISCO "I got good talk and bad talk", TODISCO responded in part "I got good news and I got bad news too". They agreed they would "work any problem out" and discussed LOFTEN's Rolls Royce and Mercedes. LOFTEN then told TODISCO it was important for him ". . . to get to you (TODISCO) . . . because I want to talk to you." LOFTEN also said "I got a lot of good things to talk about, you know what I mean?" TODISCO replied, "yea, you just want to get over a few problems." Finally, LOFTEN said, in substance, that they would talk and he guaranteed ". . . next week . . . we would be a good week . . . because this week's been a disaster." They then arranged to speak the following morning. (An analysis of pen register tapes, revealed that this call was made from LOFTEN's telephone (914) 576-2376). Because of the extremely evasive manner in which TODISCO drives, agents could not conduct surveillance of any meeting between TODISCO and LOFTEN the following morning.

On August 11, 1980, at approximately 2:37 PM, LOFTEN called TODISCO and said he thought "it'll be

best for me [LOFTEN] to meet you in the morning, same place." (An analysis of pen register tapes revealed that this call was made from LOFTEN's telephone (914) 576-2376).

On August 12, 1980, at approximately 11:10 AM, LOFTEN called for TODISCO who was not at home and, calling himself "Jay", left a message that he wanted to postpone his scheduled meeting with TODISCO that day because he had to see his "architect". (An analysis of pen register tapes, revealed that this call was made from LOFTEN's telephone (914) 576-2376). Thereafter, at approximately 11:12 AM, a woman called from telephone (212) 939-1858 to TCT and told TODISCO that "the painter Jimmy" called and that their scheduled meeting was postponed. (There is presently no evidence that LOFTEN is a painter).

On August 18, 1980, at approximately 6:27 PM, LOFTEN called TODISCO from his telephone (914) 576-2376 (per pen register tapes). Even in the context of TODISCO owning a small trucking company, (TCT), which delivers goods for others, the ensuing conversation between LOFTEN and TODISCO ostensibly made no sense at all. In substance TODISCO (who, from all the evidence gathered does not rent trucks), told LOFTEN . . . "when *we* start moving trucks again," LOFTEN would have to pay an extraordinary price ($2 per mile) for renting ". . . a full loaded trailer". TODISCO went on to note that, although the "trucks" were not that "strong", they ". . . keep coming in". The full conversation is reproduced below:

LOFTEN: Hello, Hi
FEMALE: Hi, how are you?
LOFTEN: Okay, how you been?
FEMALE: Fine thank you.
LOFTEN: Oh that's beautiful.
FEMALE: Good.

LOFTEN: My friend (Unintelligible)
FEMALE: Yes he is hold on.
LOFTEN: Okay. (Cough)
TODISCO: Hello.
LOFTEN: Hello, how ya doing?
TODISCO: Alright, how you doing?
LOFTEN: Hey, I'm okay. I got back day later.
TODISCO: Mm, mm.
LOFTEN: Did you call me?
TODISCO: I called Saturday.
LOFTEN: Yea, sorry I hung you up.
TODISCO: You weren't there (laughter).
LOFTEN: (Laughter) year I got back Sunday.
TODISCO: Yeah I figured you'd call when you come in.
LOFTEN: Yea ah got back like last night you know.
TODISCO: Yea
LOFTEN: They out sixty miles out in that desert you know.
TODISCO: Yea
LOFTEN: (Inaudible)
TODISCO: Listen, everything seems okay.
LOFTEN: Oh great.
TODISCO: There's no problem at all.
LOFTEN: Well like you say you my man Jim.
TODISCO: Yea, yea.
LOFTEN: You know what I mean.
TODISCO: There's no problem at all.
LOFTEN: Well.
TODISCO: But there will be a problem (pause) when we start moving the trucks again.

Comment: Since there is presently no evidence that LOFTEN is involved in any trucking business alone or with TODISCO, it appears that they are using the word "trucks" as a code word for quantities of heroin).

LOFTEN: Yea?
TODISCO: Yea see that's why I wanted to talk to you before, you know, you left.
LOFTEN: Really?

TODISCO: This way at least you know what's happening anyway.
LOFTEN: Yea well you
TODISCO: Yea
LOFTEN: You got a minute?
TODISCO: Yea because now, they, asking two dollars a mile, they're crazy.

Comment: A survey of three major trailer rental companies in the New York and New Jersey revealed that their mileage trailer rental charges ranged from no mileage charge to 1/2 cents per mile if driven over 100 miles per day. The fixed rental rate ranged from $120 per week to $230 per week.) After analyzing the price list Agent Silvestri received for TODISCO's heroin ("Attachment A—affidavit", p. 15) it appears that this price quote by TODISCO appears to be a coded statement that the price for one-half kilogram of heroin has increased from $145,000 to $200,000).

LOFTEN: Oh man.
TODISCO: You know.
LOFTEN: (Laugh) (Inaudible)
TODISCO: That's what they're asking, two dollars a mile.
TODISCO: But that's a full loaded trailer. You know, 40,000 pounds.

Comment: May be referring to heroin so pure it can be cut 40 times. ACOSTA referred to the purity of TODISCO heroin in such terms).

LOFTEN: Yea
TODISCO: But ah, yea they're crazy (inaudible) crazy.
LOFTEN: I'm not going to worry about that becasue ah
TODISCO: Yea
LOFTEN: Oh you know.
TODISCO: Look, you can go by that standard anyway.
LOFTEN: Yea
TODISCO: You know what I mean?
LOFTEN: Yea
TODISCO: Go on that standard and then see what you gotta do out there.

LOFTEN: Yea
TODISCO: You know, if anybody wants to haul for you.
LOFTEN: Yea, yea.
TODISCO: You could charge them.
Comment: Appears to mean LOFTEN could pass along the price increase to his customers).
LOFTEN: Well, like you say you know (clears throat) that won't affect me too tough (inaudible).
TODISCO: Yea
LOFTEN: Like you know, we gonna have to talk.
TODISCO: Yea
LOFTEN: If they really asking like that you know.
TODISCO: Ah ha, yea (inaudible).
LOFTEN: But ah
TODISCO: So why don't, why don't you do, uh, what you were telling me.
LOFTEN: Yea
TODISCO: you know.
LOFTEN: Mm
TODISCO: And see what's happening again.
(Comment: Appears to be telling LOFTEN to check with his customers.)
LOFTEN: Yea
TODISCO: You know
LOFTEN: Yea, so ah, alright you'll get in touch when ah you know.
TODISCO: Well ah, as far as me everything is okay there.
LOFTEN: Oh yea?
TODISCO: You know.
LOFTEN: Oh really?
TODISCO: Yea because we, we got a, you know, they, they coming steady now from California.
LOFTEN: Yea
TODISCO: So, trucks just keep coming in.
(Comment: TODISCO appears to be commenting on his supply of heroin)
LOFTEN: Ah ha, ah ha.

TODISCO: Not that strong but you know, like I say, like a when I was talkin to you, you know.

(Comment: TODISCO reference to the strength of the "trucks" coming in appears to refer to the quality of heroin TODISCO receiving).

LOFTEN: Yea
TODISCO: Few at a time.
LOFTEN: Yea
TODISCO: But ah
LOFTEN: Well, like I say you know, what we'll do we'll sit down and talk.
TODISCO: Yea (inaudible)
LOFTEN: And like you say you know I'm a special driver so

(Comment: It appears that LOFTEN is saying he is a special customer of TODISCO).

TODISCO: Mm, mm,
LOFTEN: I'm quite free like
TODISCO: Yea you gotta have a good driver that's for sure.
LOFTEN: You all put a good word in for me right?
TODISCO: That's for sure (laughing).
LOFTEN: Okay my man.
TODISCO: (Laughing)
LOFTEN: Like you say I'm do this hundred yard dash.
TODISCO: Yea
LOFTEN: So what you want me, get back in touch with you?
TODISCO: Yea well back to Monday and ah let me know what's happening then.
LOFTEN: As soon as possible.
TODISCO: You know?
LOFTEN: Yea. I was figuring you know like say ah, 3, 4, 5 days
TODISCO: Ah ha.
LOFTEN: You know. Like I'm going to get on down the way there.
TODISCO: Yea

LOFTEN: Have to go tomorrow.
TODISCO: Yea
LOFTEN: And do what I got to do real fast.
TODISCO: Alright good.
LOFTEN: So I'll try and give you a buzz maybe about Friday.
TODISCO: Alright, very good.
LOFTEN: And we sit down and talk.
TODISCO: Okay good.
LOFTEN: Okay?
TODISCO: Yea
LOFTEN: In the meantime let me know how special I am to you.
TODISCO: Oh ha (laughter) yea (laughter)
LOFTEN: (Laughter)
TODISCO: I will
LOFTEN: Okay?
TODISCO: Okay my man.
LOFTEN: And thanks a lot for checking everything.
TODISCO: That's no problem.
LOFTEN: Right. This way I could go and stick my chest out.
TODISCO: Yea, well that's what I want you to do.
LOFTEN: Okay?
LOFTEN: Okay.
TODISCO: You take care.
LOFTEN: Bye bye.
TODISCO: Bye bye.

In the context of this investigation, it very strongly appears that in the above conversation, TODISCO indicated in veiled and coded terms that, while he was still getting a supply of heroin, the price TODISCO would have to charge LOFTEN for heroin had increased while LOFTEN was in Arizona. TODISCO then went on to assure LOFTEN that he (LOFTEN) could pass along the price incresae to his customers.

Although TODISCO and his confederates were arrested on September 3, 1980, there is probable cause to believe LOFTEN is continuing to use telephone numbers (914) 576-2376 and (914) 576-2377 in connection with the crimes specified in ¶3(a) of this affidavit:

(a) As is evident from the intercepted communications described in paragraph 5 and from the information detailed in paragraph 4, LOFTEN is at the pinnacle of a major heroin distribution system. Because of the nature of heroin addiction and the vicissitudes attendant upon the illegal importation of heroin into this country, a heroin trafficker of LOFTEN's stature cannot rely on a single source of supply. Because heroin addicts will not accept even a day's interruption of their supply of the drug, major distributors must have alternative importation routes available to them in order to maintain their networks on a continuing basis. There is probable cause to believe that LOFTEN has alternative sources and supply, in part, because he was known to be a major heroin distributor at least as early as 1968, long before the present TODISCO network was active.

(b) Even assuming that TODISCO's arrest interrupted the supply of heroin to LOFTEN, in order to maintain his organization LOFTEN would have to seek out immediately an alternative source for the drug. For the reasons already detailed in this affidavit, there is probable cause to believe that LOFTEN would use telephones (914) 576-2376 and (914) 576-2377 to accomplish this purpose.

(c) As noted in ¶6 of this affidavit, prior to September 3, 1980, LOFTEN called over three hundred numbers across the United States. A number of these telephones have been ascribed to persons or locations suspected to be involved in the sale of heroin. I am informed by Westchester Police Officer Ted Rau that, since TODISCO's arrest, LOFTEN's telephones have continued to be used to call documented narcotics traffickers.

Specifically, analysis of the Westchester County Police pen register records for telephones (914) 576-2376 and (914) 576-2377 reveals post-Todisco arrest calls to numbers subscribed by the following individuals who, according to Drug Enforcement Administration files, are documented narcotics traffickers:

Telephone No.	*Subscriber*	*Narcotics Activities*
(602) 831-7595	George Alama, Jr. 133 West Linbener Mesa, Arizona	Known associate of Bonano family, which is known to deal in narcotics. Has a prior arrest for assault.
(212) 534-3008	Juanita Brown 1581 Park Avenue New York, New York	DEA files indicate that she is major narcotics dealer and has a number of narcotics convictions dating back to 1960's.
(212) Geller	Informants indicate 299 Broadway New York, New York	233-3370 that he is a major cocaine dealer.
(205) 666-6658	John Gulley Recovery Road Daws, Alabama	Numerous assault and narcotics arrests.
(212) 881-8907	Paul Chin 2570 Wilson Avenue Bronx, New York	Informants indicate that Chin is a major heroin dealer in New York, files indicate a number of narcotics arrests.
(305) 773-8486	Michael R. Sanchez 510 Royal Palm Blvd. Satellite Beach, Florida	Major Florida cocaine dealer, confirmed by surveillance and informant information.

(201) 489-6662	Vernon Rollins 157 Tracy Place Hackensack, N.J.	Prior homicide arrest in 1971 and 1972 heroin conviction, believed to have been associated with Leroy "Nicky" Barnes and Robert Stephanie, two of the largest heroin distributors in New York.
	Roy Harris 430 Warburton Ave. Yonkers, New York	Informant information indicates that he is presently a major heroin trafficker, narcotics related arrests in 1960's.
(201) 343-3457	Elizabeth B. Haversham 160 Overlook Avenue Hackensack, N.J.	Arrested in early 1970's for narcotics crimes
(201) 342-9414	Robert Summers 216 Prospect Avenue Hackensack, N.J.	Informants indicate that he is a major heroin dealer.
(212) 588-69[illegible]	Alan Stevens Simmons 1074 Summit Avenue Bronx, New York	Sentenced to four years in prison for narcotics conviction in 1972; convicted for perjury in 1979.
(212) 534-6641	Marian Kunckles 1581 Park Avenue New York, New York	Plead guilty to heroin conspiracy charges in 1977.

(d) I am further informed by Officer Ted Rau that, on September 9, 1980, Roy Harris, a suspected heroin with

previous narcotics arrests trafficker, was observed entering LOFTEN's home at 31 Sheldrake Lane, New Rochelle, New York between 3:00 and 3:15 p.m. Harris was subsequently observed leaving the house with a package. Since TODISCO's arrest, LOFTEN has been observed in the company of PAUL CHIN, who informants indicate is a major narcotics dealer.

ALTERNATIVE INVESTIGATIVE PROCEDURES HAVE BEEN TRIED AND FAILED OR APPEAR UNLIKELY TO SUCCEED IF TRIED; NEED FOR INTERCEPTION OF WIRE COMMUNICATIONS.

7. Physical surveillance of LOFTEN's movements is unlikely to ascertain or provide evidence as to LOFTEN's narcotics sources and business practices. Physical surveillance in the area of 31 Sheldrake Lane, New Rochelle, is difficult because it is a residential area, located in a small secluded cul-de-sac, and persons in the immediate vicinity would be alert to any strangers. Moreover, attempts to follow LOFTEN have been unsuccessful because LOFTEN takes affirmative steps to detect any possible surveillance (e.g. frequently varying driving speeds and running stop signs). From his August 18, 1980 conversation with TODISCO, it also appears that LOFTEN is wary about where he meets TODISCO.

In any event, physical surveillance only provides limited evidence of narcotics dealing between individuals. Physical surveillance in and of itself is useful only in placing two individuals together without any knowledge of the significance of the meeting. However, with the knowledge provided beforehand by electronic surveillance that a meeting is to take place at a given location, physical surveillance then assists greatly in identifying the individuals.

8. Similarly, telephone tolls records and the pen register device only show that a conversation has occurred. They do not reveal the subjects discussed or the actual participants.

Thought has been given to utilizing a Federal Grand Jury investigation in this matter. However, the only witnesses who could provide evidence to the grand jury as to LOFTEN's sources of supply and distribution network are higher echelon associates who are themselves defendants or subjects of the investigation. In view of the fact that they face criminal prosecution, it is not likely that they would testify voluntarily. Moreover, there are not sufficient facts available to make an intellligent determination as to whom, among the alleged conspirators, should be compelled to testify under any grant of immunity. In addition, attempts to contact subjects of the investigation would, of course, alert them to the existence of the investigation and may cause them to take further evasive steps to frustrate it.

10. It is not very likely that a search pursuant to warrant of 31 Sheldrake Lane, New Rochelle, New York would reveal the presence of narcotics and other contraband. Moreover, even if such a search did result in the seizure of narcotics and related items at 31 Sheldrake Lane, New Rochelle, New York, such a seizure would not likely reveal the full scope of the conspiracy and the identity of all the participants in it.

11. Substantial but unsuccessful efforts have been made to locate any confidential informant who could introduce an undercover agent to LOFTEN and provide further information concerning the activities of LOFTEN and his sources. I also have spoken to personnel of the Unified Intelligence Division, a joint Drug Enforcement Administration/ New York City Police Department unit, and was informed that they are unaware of any reliable in-

formant who could make an inroduction of an undercover agent to LOFTEN.

12. It appears that there is no hope of undercover agents infiltrating the upper echelon of this narcotic trafficking operation occupied by LOFTEN. For example, despite extensive undercover activities in the Bronx and Harlem by DEA and despite extensive information concerning LOFTEN's large scale heroin distribution operation there for at least 11 years, no undercover agent has even been able to gather enough evidence for a prosecutable case against LOFTEN. Moreover, interception of LOFTEN's calls to TODISCO are not at all likely to disclose the nature of LOFTEN's operation and identify those involved in it.

13. Based on the foregoing, it is my opinion that the interception of wire communications occurring over telephone numbers (914) 576-2376 and (914) 576-2377, subscribed to by JAMES LOFTEN, is essential to probe the full scope of this narcotics conspiracy.

14. Inasmuch as the illegal narcotics business described herein is a continuing conspiracy involving numerous persons as yet unidentified and unknown, it is requested that authorization to intercept not terminate when the sought wire communications are first obtained, but continue until interception reveals the role of JAMES LOFTEN, a/ka/ "Jay", a/k/a "Jimmy", a/k/a "the painter", and his confederates, or for twenty days, whichever occurs first.

15. The Special Agents of the Drug Enforcement Administration who are to carry out the requested interception of wire communications have been and will continue to be instructed concerning the steps they should take to avoid infringing any defendant's right to counsel under the Sixth Amendment of the Constitution.

16. Because the participation of officers of the Westchester County Police Department and local pro-

secutor's offices (who are authorized by law to investigate, make arrests or prosecute offenses enumerated in ¶2 herein) may be beneficial to this investigation, it is requested that they be authorized to assist the Drug Enforcement Administration in conducting this electronic surveillance and to receive disclosure of intercepted communications involving telephone facilities (914) 576-2376 and (914) 576-2377.

17. Pursuant to the provisions of Title 18, United States Code, Section 2518(4), the Court should, upon request of the applicant, direct that a communication carrier furnish the technical assistance necessary to accomplish the interception unobtrusively and with a minimum of interference with such services as that carrier is according the persons whose communications are to be intercepted. The assistance of the communications common carrier, the New York Telephone and Telegraph Company, is required to accomplish the objectives of the requested interceptions. Expenses necessarily incurred pursuant to the activity will be processed for payment by the Drug Enforcement Administration, United States Department of Justice.

JOSEPH J. CORCORAN
Special Agent
Drug Enforcement Administration

Sworn to before me this
day of September, 1980

UNITED STATES JUDGE

APPENDIX E—CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

AMENDMENT IV—SEARCHES AND SEIZURES

The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no Warrants shall issue, but upon probable cause, supported by Oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized.

AMENDMENT V—CAPITAL CRIMES; DOUBLE JEOPARDY; SELF-INCRIMINATION; DUE PROCESS; JUST COMPENSATION FOR PROPERTY

No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the Militia, when in actual service in time of War or public danger; nor shall any person be subject for the same offence to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation.

18 U.S.C.

§2515. Prohibition of use as evidence of intercepted wire or oral communications

Whenever any wire or oral communication has been intercepted, no part of the contents of such communication and no evidence derived therefrom may be received in evidence in any trial, hearing, or other proceeding in or before any court, grand jury, department, officer, agency,

regulatory body, legislative committee, or other authority of the United States, a State, or a political subdivision thereof if the disclosure of that information would be in violation of this chapter.

§2518. Procedure for interception of wire or oral communications

(1) Each application for an order authorizing or approving the interception of a wire or oral communication under this chapter shall be made in writing upon oath or affirmation to a judge of competent jurisdiction and shall state the applicant's authority to make such application. Each application shall include the following information:

(a) the identity of the investigative or law enforcement officer making the application, and the officer authorizing the application;

(b) a full and complete statement of the facts and circumstances relied upon by the applicant, to justify his belief that an order should be issued, including (i) details as to the particular offense that has been, is being, or is about to be committed, (ii) a particular description of the nature and location of the facilities from which or the place where the communication is to be intercepted, (iii) a particular description of the type of communications sought to be intercepted, (iv) the identity of the person, if known, committing the offense and whose communications are to be intercepted;

(c) a full and complete statement as to whether or not other investigative procedures have been tried and failed or why they reasonably appear to be unlikely to succeed if tried or to be too dangerous;

(d) a statement of the period of time for which the interception is required to be maintained. If the nature of the investigation is such that the authorization for interception should not automatically terminate when the described type of communication has been first obtained,

a particular description of facts establishing probable cause to believe that additional communications of the same type will occur thereafter;

(e) a full and complete statement of the facts concerning all previous applications known to the individual authorizing and making the application, made to any judge for authorization to intercept, or for approval of interceptions of, wire or oral communications involving any of the same persons, facilities or places specified in the application, and the action taken by the judge on each such application; and

(f) where the application is for the extension of an order, a statement setting forth the results thus far obtained from the interception, or a reasonable explanation of the failure to obtain such results.

(2) The judge may require the applicant to furnish additional testimony or documentary evidence in support of the application.

(3) Upon such application the judge may enter an ex parte order, as requested or as modified, authorizing or approving interception of wire or oral communications within the territorial jurisdiction of the court in which the judge is sitting, if the judge determines on the basis of the facts submitted by the applicant that—

(a) there is probable cause for belief that an individual is committing, has committed, or is about to commit a particular offense enumerated in section 2516 of this chapter;

(b) there is probable cause for belief that particular communications concerning that offense will be obtained through such interception;

(c) normal investigative procedures have been tried and have failed or reasonably appear to be unlikely to succeed if tried or to be too dangerous;

(d) there is probable cause for belief that the facilities from which, or the place where, the wire or oral communications are to be intercepted are being used, or are about to be used, in connection with the commission of such offense, or are leased to, listed in the name of, or commonly used by such person.

(4) Each order authorizing or approving the interception of any wire or oral communication under this chapter shall specify—

(a) the identity of the person, if known, whose communications are to be intercepted;

(b) the nature and location of the communcations facilities as to which, or the place where, authority to intercept is granted;

(c) a particular description of the type of communication sought to be intercepted, and a statement of the particular offense to which it relates;

(d) the identity of the agency authorized to intercept the communications, and of the person authorizing the application; and

(e) the period of time during which such interception is authorized, including a statement as to whether or not the interception shall automatically terminate when the described communication has been first obtained.

An order authorizing the interception of a wire or oral communication under this chapter shall, upon request of the applicant, direct that a communication common carrier, landlord, custodian or other person shall furnish the applicant forthwith all information, facilities, and technical assistance necessary to accomplish the interception unobtrusively and with a minimum of interference with the services that such carrier, landlord, custodian, or person is according the person whose communications are to be intercepted. Any communication common carrier, landlord, custodian or other person furnishing such

facilities or technical assistance shall be compensated therefor by the applicant at the prevailing rates.

(5) No order entered under this section may authorize or approve the interception of any wire or oral communication for any period longer than is necessary to achieve the objective of the authorization, nor in any event longer than thirty days. Extensions of an order may be granted, but only upon application for an extension made in accordance with subsection (1) of this section and the court making the findings required by subsection (3) of this seciton. The period of extension shall be no longer than the authorizing judge deems necessary to achieve the purposes for which it was granted and in no event for longer than thirty days. Every order and extension thereof shall contain a provision that the authorization to intercept shall be executed as soon as practicable, shall be conducted in such a way as to minimize the interception of communications not otherwise subject to interception under this chapter, and must terminate upon attainment of the authorized objective, or in any event in thirty days.

(6) Whenever an order authorizing interception is entered pursuant to this chapter, the order may require reports to be made to the judge who isued the order showing what progress has been made toward achievement of the authorized objective and the need for continued interception. Such reports shall be made at such intervals as the judge may require.

(7) Notwithstanding any other provision of this chapter, any investigative or law enforcement officer, specially designated by the Attorney General or by the principal prosecuting attorney of any State or subdivision thereof acting pursuant to a statute of that State, who reasonably determines that—

(a) an emergency situation exists with respect to conspiratorial activities threatening the national

security interest or to conspiratorial activities characteristic of organized crime that requires a wire or oral communication to be intercepted before an order authorizing such interception can with due diligence be obtained, and

(b) there are grounds upon which an order could be entered under this chapter to authorize such interception,

may intercept such wire or oral communication if an application for an order approving the interception is made in accordance with this section within forty-eight hours after the interception has occurred, or begins to occur. In the absence of an order, such interception shall immediately terminate when the communication sought is obtained or when the application for the order is denied, whichever is earlier. In the event such application for approval is denied, or in any other case where the interception is terminated without an order having been issued, the contents of any wire or oral communication intercepted shall be treated as having been obtained in violation of this chapter, and an inventory shall be served as provided for in subsection (d) of this section on the person named in the application.

(8)(a) The contents of any wire or oral communication intercepted by any means authorized by this chapter shall, if possible, be recorded on tape or wire or other comparable device. The recording of the contents of any wire or oral communication under this subsection shall be done in such way as will protect the recording from editing or other alterations. Immediately upon the expiration of the period of the order, or extensions thereof, such recordings shall be made available to the judge issuing such order and sealed under his directions. Custody of the recordings shall be wherever the judge orders. They shall not be destroyed except upon an order of the issuing or denying judge and in any event shall be kept for ten years.

Duplicate recordings may be made for use or disclosure pursuant to the provisions of subsections (1) and (2) of section 2517 of this chapter for investigations. The presence of the seal provided for by this subsection, or a satisfactory explanation for the absence thereof, shall be a prerequisite for the use or disclosure of the contents of any wire or oral communication or evidence derived therefrom under subsection (3) of section 2517.

(b) Applications made and orders granted under this chapter shall be sealed by the judge. Custody of the applications and orders shall be wherever the judge directs. Such applications and orders shall be disclosed only upon a showing of good cause before a judge of competent jurisdiction and shall not be destroyed except on order of the issuing or denying judge, and in any event shall be kept for ten years.

(c) Any violation of the provisions of this subsection may be punished as contempt of the issuing or denying judge.

(d) Within a reasonable time but not later than ninety days after the filing of an application for an order of approval under section 2518(7)(b) which is denied or the termination of the period of an order or extensions thereof, the issuing or denying judge shall cause to be served, on the persons named in the order or the application, and such other parties to intercepted communications as the judge may determine in his discretion that is in the interest of jsutice, an inventory which shall include notice of—

(1) the fact of the entry of the order or the application;

(2) the date of the entry and the period of authorized, approved or disapproved interception, or the denial of the application; and

(3) the fact that during the period wire or oral communications were or were not intercepted.

The judge, upon the filing of a motion, may in his discre-

tion make available to such person or his counsel for inspection such portions of the intercepted communications, applications and orders as the judge determines to be in the interest of justice. On an ex parte showing of good cause to a judge of competent jurisdiction the serving of the inventory required by this subsection may be postponed.

(9) The contents of any wire or oral communication intercepted pursuant to this chapter or evidence derived therefrom shall not be received in evidence or otherwise disclosed in any trial, hearing, or other proceeding in a Federal or State court unless each party, not less than ten days before the trial, hearing, or proceeding, has been furnished with a copy of the court order, and accompanying application, under which the interception was authorized or approved. This ten-day period may be waived by the judge if he finds that it was not possible to furnish the party with the above information ten days before the trial, hearing, or proceeding and that the party will not be prejudiced by the delay in receiving such information.

(10)(a) Any aggrieved person in any trial, hearing, or proceeding in or before any court, department, officer, agency, regulatory body, or other authority of the United States, a State, or a political subdivision thereof, may move to suppress the contents of any wire or oral communication intercepted pursuant to this chapter, or evidence derived therefrom, on the grounds that—

(i) the communication was unlawfully intercepted;

(ii) the order of authorization or approval under which it was intercepted is insufficient on its face; or

(iii) the interception was not made in conformity with the order of authorization or approval.

Such motion shall be made before the trial, hearing, or proceeding unless there was no opportunity to make such motion or the person was not aware of the grounds of the motion. If the motion is granted, the contents of the in-

tercepted wire or oral communication, or evidence derivied therefrom, shall be treated as having been obtained in violation of this chapter. The judge, upon the filing of such motion by the aggrieved peson, may in his discretion make available to the aggrieved person or his counsel for inspection such portions of the intercepted communication or evidence derived therefrom as the judge determines to be in the interests of justice.

(b) In addition to any other right to appeal, the United States shall have the right to appeal from an order granting a motion to suppress made under paragraph (a) of this subsection, or the denial of an application for an order of approval, if the United States attorney shall certify to the judge or other official granting such motion or denying such application that the appeal is not taken for purposes of delay. Such appeal shall be taken within thirty days after the date the order was entered and shall be diligently prosecuted.